

[Proposed Revision]

NEW JERSEY COURT RULES (PROGRAM)

Atlantic City - May 15, 1969

ELI JARMEL SPEAKS:

I'd like to welcome you to the program and start with an announcement about the book we promised to deliver to you. The Rules book with annotations by Mrs. Pressler is to be published by Gann books. . . . I am told now that that publication will be printed and mailed to you some time in the month of June. The Rules are effective on September 8. I must also apologize to those of you who registered today and did not get the mimeographed material which consists of copies of selected Rules. The material will be mailed to you. We have your names by code number.

At this point, I'd like to introduce our program moderator, Standing Master of the Superior and Supreme Courts, Saul Tischler. Judge Tischler . . . (applause)

JUDGE TISCHLER SPEAKS:

Thank you, Mr. Jarmel. Ladies and gentlemen, the revised Rules of 1969 are the work of many and done over a period of many years. It represents the effort of the New Jersey Supreme Court to establish a leadership role in the improvement of judicial procedure. As you're all aware, in 1948, we adopted a set of rules based in part, upon the Federal rules and incorporating a great part

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of our best practice existing at that time. Those rules were inspired by our great Chief Justice, Arthur T. Vanderbilt. They served us very well, and in 1953 we had a second revision which was required because of the amendment of various statutes which took out procedural provisions and incorporated them in the rules.

About six years ago, the Supreme Court of New Jersey decided it was time to review the existing rules. It appointed ten committees to analyse the existing rules in detail, examine the rules of every court in the United States, and review the procedure in the various states. In 1966, the Supreme Court published a yellow book, a tentative draft of the rules which were discussed here two years ago after they had been reviewed by the judicial conference.

A coordinating committee was appointed by the Supreme Court to review the suggestions which were made after the yellow book was published. Thereafter, several members of the coordinating committee consisting in part of Judge Clapp, Mrs. Pressler, and Julius Wildstein consulted with the Court many times during the ensuing period. Recently, the rules were adopted and take effect at the opening of the fall term. It is splendid that so many of you have come here today to learn the rules and study them for the benefit of your clients because your clients are the ones who will be benefited by the Rules. On the other hand, they may be injured by

your failure to comply with them. I have very little to say. I'm acting as moderator. I don't know why they picked me. I'm not much of a speaker, a lecturer, but not much of a speaker. Apparently, as a representative of the Supreme Court they felt I have some semblance of authority. All the members of the panel this afternoon and tonight have one thing in common. They are all members of the coordinating committee on the rules; the one that is responsible for the publication of these rules. With the exception of Judge Matthews, all of them are associate editors of the New Jersey Law Journal.

Our first panelist will discuss Part 1, Chapter 1 - Rules of General Application. A former law clerk of Judge Conford, a former first assistant corporation counsel of Bergen County, now City Solicitor for Englewood, a hearing examiner for the Civil Rights Division in this State, and the Reporter, the person responsible for all the comments in connection with the Rules and the one who will publish those comments and annotations in the Rule book which has been previously mentioned. It is with a great deal of pleasure that I introduce to you Mrs. Sylvia Pressler, the youngest, the fairest, and most beautiful member of our panel.

I just want to say one thing more. We will not be interrupted by any questions from the floor. You are to write out your questions and we will

discuss them at the end of the discussion. I, however, reserve the right to interrupt with questions where I feel that it may be helpful.

SYLVIA PRESSLER SPEAKS:

Thank you very much. I must say that the Standing Master is far too modest about his contribution to this revision for better or for worse. We are already working on next year's revisions of the revision. To give you an indication of the Standing Master's contribution to this, we had lunch together and Judge Matthews was talking about some philosophical works he had been reading, and the Standing Master said, "How do you get time to read." He said, "All I've read was the Rules four times". He's gone over it very carefully, worked with us and is responsible for picking up some awful bloopers. I hope he's done his job well.

As to the revisions, I should also say, and I'd be remiss in not saying so, it's very hard to point to particular people when the effort of so many people has gone into this effort, but the contributions which were made by Judge Clapp, Julius Wildstein, Edward Mc Connell, the Administrative Director, and Saul Tischler made this revision possible.

As to Part 1, the major formal change which has been made by this revision is the re-grouping of the parts of the Rules. Part 1 is no longer the Rules of the Supreme Court. Part 1 is now Rules of General Application. To give you an overall view, Part 2 covers for both the Supreme Court and the Appellate Division. Part 3 covers the Criminal Rules. Part 4 is Superior Court and County Court Rules. One of the things we've done is the eliminations of a separate part dealing with County Court Rules. County Court procedure is now governed by Part 4 as well. Part 5 covers Juvenile and Domestic Relations Court. Part 6, the District Court. Part 7, the Municipal Court Rules. We've at least thus far succeeded in eliminating one part of the Rules, and, Saul says, 176 pages.

Part 1 has culled all of the Rules of General Application from all of the parts of the present rules and now includes rules which are applicable either to all courts (that's from the Municipal Court up to the Supreme Court) or which are applicable to all trial courts. Part 1 now includes such matters as form and execution of papers, filing of papers, contempt, subpoena, time provisions, all of the provisions which are in various parts which have been or should have been or were construed as being applicable to all courts. As

to the changes, Rule 1:2 deals with conduct of proceedings, generally. The

first of the significant changes is in the making of the verbatim record.

The Rule provides now unequivocally, that all proceedings, everything which takes place in open court must be verbatim recorded, either by sound recording if that's the device used in the court, or by stenographic recorder.

The only exceptions are pre-trial conferences, settlement conferences, calendar calls and ex-parte motions, but even these may at the court's direction be recorded. The main change now is that voir dire examination must be recorded. The reason for this is quite obvious. It's part of the developing constitutional construction of what constitutes a fair trial. It has become increasingly more important for the Appellate Court to be aware of the composition of the jury. The voir dire examination will not be routinely transcribed for Appellate purposes just as the case of opening and closing arguments, unless a question with respect to the voir dire is raised on the appeal.

1:2-5 deals with preferences. It doesn't make any substantial change in the practice, but I should point out to you that many members of the Bar have, from time to time, requested that there be a preference for commercial calendar.

After a great deal of consideration and arguing back and forth, the Supreme Court has not provided such a preference. However, the preference for non-jury cases continues and if there's a waiver of jury, then it gets that preference. I'll also point out to you a Rule which will be pointed out to you by Judge Matthews and that's the New Summary Action Rule which also provides an opportunity for obtaining a preference for a commercial case.

Rule 1:3 deals with time provisions. There are no substantial changes in time calculations: when things have to be done, when things are accomplished. There's still the extra 3 days of service if accomplished by mailing. With respect to enlargement of times, the Rule now simply refers to all other rules which themselves provide for various enlargement provisions, such as the Appellate Rules enlargement in the Superior Court and in the County Court. The only change in the rules with respect to the prohibition of enlargement relate to the Criminal Court which has a new interlocutory appeal practice. In other words, the interlocutory orders of a municipal court may now be taken on interlocutory appeal to the County Court rather than to the Appellate Division and that time provision may not be enlarged. There's also a new judgment n.o.v. practice in the criminal court and that time provision may not be enlarged.

Rule 1:4 deals with the form and execution of papers. This is probably the least philosophical or jurisprudentially motivated rule in the whole book, but has heretofore created the greatest agitation among the Bar. There are two rules which should be pointed out: 1:4-1 and 1:4-9. Together, they provide this. All filed papers will be filed on letter rather than on legal-size paper. There is a two-year grandfather clause to use up your present supplies of paper. The only place where this apparently has been tried is in California and they seem to be quite pleased. The argument is that only lawyers continue to use 8 1/2 by 14 and it's archaic, and we shouldn't have to have larger filing cabinets and this and that and the other thing. As I say, it's something which ought to be brought to your attention. There's no philosophical basis. The other change which goes along with the size of paper change is the elimination of the backer. This is in accordance with the change made in the California practice which has been successful there. The clerks, I understand, are quite upset about the elimination of the backer. They have from time immemorial been filing papers folded up into quadrants and are upset as to how they'll operate. One of the purposes of the

elimination of the backer was to permit flat filing which was what most of the Judges want. It makes things much easier to cope with. As a matter of mechanics, the first page of the filed paper will have a three-inch blank at the top of the page for the clerk's notations. Then the material which is usually in the backer will follow in the caption. We've added the requirement that the attorney's phone number and address also be added. So what you'll have is a standard caption with the addition of the address and the phone number of the attorney and then follows the pleadings. There are all kinds of certifications which now appear on the backer, certifications as to service, certifications as to timely answer, jury trial demands. A variety of things which are now on the backer. As a matter of technique, simply attach a blank page to the end of the pleadings and call it certifications and all that material which has been on the backer can simply be next to the pleading itself on the last page.

1:4-4 deals with the form of affidavits. In response to requests from the bench, we're requiring that in the caption of the affidavit the proceeding which it is filed in support of, be identified together with the

original return date so that a Judge reviewing a file will know in connection with what aspect of the case an affidavit was filed. For example, an affidavit filed in support of summary judgment should note the original return date. Also, and I think this is an important innovation of great convenience, the certification form which is now applicable to interrogatories "I hereby certify that the answers herein given are true to the best of my knowledge and belief and I am subject to punishment". That certification may now be used in lieu of any sworn statement required to be filed. You will not have to have an attorney or a notary taking the jurat of a filed affidavit. The certification will be sufficient. Now we had hoped that we would be able to get a statutory change so that the perjury penalty would be applicable in the event of a false certification as of course it is in the case of an affidavit. Naturally, the contempt penalty will be applicable. The legislature has not responded, as in fact, it has failed to respond to practically all of our salutary suggestions, but we left it in anyway and the certification reads, "I am subject to punishment" and that will include the gamut of whatever the legislature should decide to amend the statute to provide.

Rule 1:5 deals with the service and filing of papers. There are some changes of note therein. 1:5-2 requires every paper in the action required to

be filed, to be also served on all other attorneys and on all parties appearing pro se except those who have defaulted. This simply clarifies what has, in effect, been the practice. There are enumerable rules presently which require service of the paper on a lawyer. This rule groups them all simply by saying everything has to be served on your adversary. Now as to the method of service, we have not permitted service at the home of an attorney unless his office is closed or there is no office. That sometimes gets to be a harrassing method. With respect to service on a party, while the rule was amended a year or so ago to permit service by ordinary mail on attorneys, the requirement for registered and certified mail was retained. That is still retained in this revision, except that we have provided that if a party refuses to accept or claim delivery of registered or certified mail, then he can be served by ordinary mail. And I should also point out that this applies to all service of paper rules, including 4:4-4, 4:4-5 and every other rule dealing with service. Where service is required to be by registered or certified mail, it can be made by ordinary mail if the addressee refuses to claim or accept it. We've also in 1:5-3 for the purpose of convenience, added an alternative

method of proof of service. It's always had to be by affidavit or acknowledgment. We are now permitting a simple attorney certification saying that the papers were served.

1:5-5 is an important rule and applies to actions which are not class actions, but in which there are numerous defendants, and it permits the court to appoint a representative among the defendants for the purpose of receiving service on behalf of all defendants.

1:5-6 is the rule dealing with filing of papers. The important change we have made is to prohibit the clerk from returning non-conforming papers. The thought has been that the clerk performs a ministerial function and whatever is given to him, he's got to file. If he wishes to take it upon himself to notice lawyers of non-conforming matters, he may do so and the lawyer, if he agrees, can then correct it, but the paper will be filed and responsibility is placed as it should be on the Bar. The only situation in which the clerk may return a paper, is if the filing fee is not paid. (And this usually happens with pro se litigants). In which case, the paper will be marked for filing as of the date it was originally filed if the fee is transmitted within 10 days. Now a lot of people on the committee have said, well how are we

going to enforce this letter-size rather than legal size if the clerk can't return legal size, and I frankly don't have an answer to that. I think that the Bar when it begins to use the letter-size paper will like it and there won't be that kind of problem. The foregoing applies also to the clerk in the Appellate Division.

As to motions, 1:6 is now the first of the rules which deals only with trial courts rather than all courts. It preserves by reference the particular motion practice of the district court, that is, the entry of judgment on notice practice. It makes few changes, one of which, however, is to specify the time within which a cross motion must be made. That has never yet been specified. The requirement is three days which is the same time period in which you file counter affidavits or otherwise object. We also require specifically, and this is something which ought to be a matter of course, but the Judges say isn't, that an affidavit must be filed in support of a motion where facts are relied upon which are not either of record or judicially noticeable.

1:7 deals with general provisions for trials. It makes a lot of changes in the criminal practice, but I think our format here is not to get into the

criminal practice at all. There are, however, also some important changes made in the civil practice. First, as to proffer of proof, the rule presently provides that in a non-jury case, the court may permit the evidence sought to be adduced which is held to be inadmissible to actually be adduced and put on the record. That privilege is not granted where there is a jury trial. The appellate court has pointed out time and time again that if the excluded evidence had actually been taken on the record, it would often avoid the need for a remand when that turned out to be the critical issue. We have therefore provided as follows: With respect to a non-jury trial, the proffered excluded evidence must be taken unless it is clearly not admissible, and presumably this would be beyond question to the trial judge, if there is any question he should allow it, where it is clearly not privileged or if the interest of justice otherwise require. Now that is one of those catch-alls which aren't too helpful. The type of situation the rule anticipates is where taking of the excluded evidence would result in a collateral trial of its own, would be very time-consuming, would really impair the coherence of the trial. But normally, and usually the question arises in the context of one question or two questions

or one witness, usually the excluded evidence should be taken and put on the record. It is also now permitted to be taken in that manner in a jury trial, of course, out of the presence of a jury provided the Judge finds that the taking of the evidence will not impair the trial, again creating the delay, impairing the coherence for the jury. We hope to encourage the taking of excluded evidence by this Rule in all circumstances.

1:7-5 re-defines trial errors. This is really what is presently 4:63-1 and 2. It does so by definition as developed by the cases. It says the judge shall disregard trial error which does not prejudice a substantial right. That is now the definition of harmless error. It requires the court to notice error which is clearly capable of producing an unjust result for, at, or after trial. That is now the definition of plain error. How it's interpreted is another matter. We hope, however, by putting the definition, as developed by the cases, in the rule to encourage the more reasonable application of what has heretofore been referred to as the plain error and the harmless error rule.

1:8 deals with jury trials. Again, a number of the innovations relate to criminal trials. As to civil trials, for purposes of achieving uniformity

throughout the counties and of saving time in the voir dire, the rule now expressly requires what is actually the practice of most counties, that all the jurors be called and seated in the box before any interrogation. The major innovation is to require the interrogation to be conducted initially by the court and the lawyer may supplement the interrogation of the jurors only in the court's discretion. I understand that that accords generally with the federal practice in civil matters. The tentative draft rule had suggested that for each one or two additional alternate jurors drawn, that there would be an additional peremptory challenge. We concluded that that would have required legislative action because the peremptories are governed by statute, and again, we've got no legislative response so it's not in this revision. The jury list: the only provision in the present rules for the availability of the jury list prior to trial relates to capital cases where the defendant is entitled to the special panel list three days before trial. The court has concluded that there is no reason why any litigant in any action, civil or criminal, should not have the entire general panel list in advance of trial and the rule now provides that you can get it on request ten days before the trial. The only opposition or question addressed to the

provision is that advantage can be taken of this rule primarily by the carriers who have all of this retrievable data regarding the history of claimants and that it is a provision which may well prejudice plaintiffs, but there it is.

1:8-6 deals with sequestration and changes the rules substantially.

The present rules provide for no sequestration in civil cases at all and for sequestration generally in capital cases. The trend has been away from sequestration. It is usually more prejudicial to the litigants who incur the hostility of the jury than not, and presumably, if there are no extraordinary circumstances required in the protection of jurors or some other reason, the interests of justice are better served without sequestration. However, where there is an extraordinary need, sequestration is expressly permitted in civil cases as well.

1:8-7 makes a major change in the practice dealing with requests to charge. The court was concerned that often, lengthy requests are given to a judge just before he's ready to charge and they often involve legal research, delaying the charge to the jury. The rule provides that all requests to charge be handed up to the trial judge before the commencement of trial, except

as to those issues which are not then anticipated. There's some question in my mind and I think in others as to whether or not this rule is going to accomplish the purpose. There are going to be lots of firms who are going to be using standard requests which will have very little applicability to the case in hand but which cover all the bases, and it is often extremely difficult to anticipate just exactly what issues you're going to want to concentrate on when the jury is being charged. It probably will create more labors for the court than not, but, that of course, remains to be seen.

1:8 deals with subpoenas. The changes are insubstantial with respect to the upper court practice; it conforms the lower court practice with the upper court practice.

1:10 is contempt. Those rules have not been changed.

1:11-3 is an important rule to bring to your attention. It governs the termination of responsibility of attorneys and this is particularly of relevance in the matrimonial practice. It provides that when the time has expired in which your adversary may appeal, you are no longer the attorney, which hopefully will prevent you from being served with all kinds of support revision orders years after you have lost touch with the client. There is a

distinct termination of responsibility at that point.

1:12, I really don't have time to go into it, but I should bring to your attention that it is the rule having to do with disqualification of judges, or death or disability during trial and does provide for continuation of the trial where possible. I am running out of time. Let me get to 1:21 which does make some important changes.

1:21-1. First, there has been a great deal of agitation regarding the provision of our Rules heretofore that a New Jersey practitioner must reside in the state of New Jersey. We have proposed in the tentative draft rule that an alternative to the residency requirement would be regular attendance at an office in this state. A lot of people objected to that, because regular attendance is such an ambiguous kind of standard and presumably would permit people to maintain offices in two states. What we have now provided is that in lieu of residence you are permitted to practice in the state if you maintain your principal office for the practice of law in this state. With respect to pro se appearances, that is also in 1:21-1. Heretofore, the rules have permitted a pro se appearance by a party or guardian. We now require that the party appearing pro se must be the real party in interest.

The purpose of that is to eliminate appearances by fiduciaries, trustees, executors, administrators, administrators ad prosequendum, etc. The feeling of the Court is that a lay fiduciary should not be permitted to represent another's beneficial interest. Laytrustees, for example, would have to be represented as well.

1:21-1(c) follows the January 1969 amendment to the rule regarding to practice in the small claims division and by cross reference provides essentially that a corporation can appear pro se in the small claims division.

Now, the rule which has created the biggest tempest in the teapot in this revision is Rule 1:21-5 which abolishes the title of counsellor. The way the tempest came about, I understand, is the newspaper reporter who saw this in the rule really thought he had something and wrote an article in the newspaper saying that there weren't counsellors anymore and the administrative office of the Courts as well as the offices of the several members of the coordinating committee were beseiged by inquiries from attorneys asking whether or not they would have to take counsellor off their stationery and off their doors, etc. I can offer you a definitive interpretation from the Administrative Director of the Courts. The intention of the rule was simply to

abolish the office of counsellor. Newly admitted attorneys are going to have certificates just saying "attorney" not attorney and counsellor. Pleadings will be signed under the title "attorney". What you wish to call yourself so long as it is neither unethical or obscene is a matter of your personal choice and the Bar may continue to have "counsellor" on the stationery and "counsellor" on the door. I've run over the time.

I just want to point out that the rest of part 1 deals with, in vastly abbreviated form, all of the rules of administration which are not particularly relevant to regular practice. The rules of admission and the ethics committee rules, record keeping rules, rules regarding conflicts of interest. Let me just point out one thing and then I will stop. The rule has been very narrow in its construction heretofore or in its statement of what constitutes "municipal attorney", and what practice is prohibited by municipal attorneys. We have now provided in the rule that that statement is not to be deemed exhaustive of the conflict of interest situations. The opinions of the ethics committee, the advisory committee on ethics, have gone far beyond the rules provisions and that is picked up by this rule. Thank you.

JUDGE TISCHLER:

Thank you Mrs. Pressler. There are a number of seats along the sides and the front. I don't think anyone should be standing when there are seats available. I should like to call attention to three of the rules that were covered by Mrs. Pressler. (1) 1:5-7 which requires an affidavit of non-military service in every case in which a judgment is entered. 1:5-6(c) which you like very much, the clerk cannot return papers, does not apply to the court. The court has and will return papers that do not conform with the proper practice. I should like to call your attention to 1:21-6, the record provisions of the Rules which I think should be studied by every attorney because there are some very stringent requirements as to records. They are I think a little bit more stringent than the existing rule.

Our next panelist is a former professor of law at Rutgers. He now lectures at that school and the Suffolk Law School in Boston on New Jersey practice. A former special attorney general, former general counsel for the New Jersey Highway Authority at which time he was quite an expert on condemnation, a past president of the Essex County Bar Association and co-author of that noted book on the rules, Schnitzer and Wildstein, The New Jersey Rules Service. He has written extensively on the rules and procedure. He is an

active practitioner in Newark. It is my privilege to present to you Professor Morris Schnitzer, who will discuss motions, parties, process and judgment.

MR. SCHNITZER SPEAKS:

Judge Tischler, fellow panelists, judges and fellow lawyers, I am very glad that Judge Tischler has restored me to my full academic rank or I would have had to summon the Dean to do that. Nowadays, they are often busy with students on the campus.

Two things. First, the rules assigned to me couldn't possibly be covered in the time allotted and so what I have done is to sort them out in the order in which I think they will ultimately come to matter to you. So in my presentation it won't be possible to turn pages in sequence in the Rule book or whatever papers you have before you. And second, we are going to have to take notice of the present, soon to become the past, and we are not going to do it in order to emulate the dodo bird. That was the fabled creature that was in the habit of propelling itself into the future facing backwards, obviously more interested in where it had been than in where it was going. Our interest in the past is not antiquarian, but we need to stake out the present in order to take a compass bearing on the future.

And with that start let me begin as the first topic with joinder of claims and parties. Now two sets of rules will be especially involved in this first item. They are 4:28 and 4:32. Let me recall to you first that the engineering, for that is what it was, the engineering concept of joinder of parties with which the rules began, borrowed from the federal practice, was a scheme of permissive joinder. As of today, there is only one rule in the book which by text compels joinder and that is the rule which states that you lose a counterclaim for liquidated amount, the classic set up, unless it is interposed. Every other claim is joinder or not at your option so far as the text of the rules is concerned, but, for a very long time our courts have been evolving and I think by now have entrenched a doctrine of compulsory joinder which bears the name, the entire controversy doctrine. That has its apogee in four cases. First there is Vacca v. Stika, 21 N.J. 471, a decision in which judges are admonished to police actions against under-joinder in plain language to direct the parties to gather in the entire controversy by joinder. The next is Falcone v. Middlesex County Medical Society, 47 N.J. 92. Now in that case, a damage claim was lost simply because it wasn't associated and prosecuted at the same time as an in lieu proceeding. It was brought and

maintained against the medical society to compel admission. The two were regarded as opposite sides of the same coin of controversy. Ekalo v. Construction Service Corporation of America, 46 N.J. 82 is another in this series and this was a case which decided that per quod claims must be associated with personal injury claims or are lost. By the way, the doctrine of this case has now been written into the new rules and is 4:28-3, if I recall it correctly. Yes, it is 4:28-3(b). The next is Messari v. Einsiedler, 6 N.J. 303 and this was a case which held that the failure to interpose a mandatory defense in this case of an equitable character forfeited by preclusion of a counterclaim based upon the same subject matter. Now it isn't primarily my object, to sketch out for you the full dimensions of the entire controversy doctrine so much to say to you that against a 20-year history in which a doctrine, a judicially declared and evolved doctrine of compulsory joinder, was superimposed upon a set of rules which by text made joinder almost entirely voluntary, brings us to this posture. The doctrine stands and flourishes. I think it will grow and become even better in points. Secondly, the same engineering concept, i.e., the rules do not by text compel joinder, substantially survives. Only two kinds of plaintiffs are now mandatory under

penalty of forfeiture so far as the Rule text is concerned and they are the old familiar set off on the one hand and now the per quod claims in association with personal injury claims. On the other hand, there has been an immense change in the conception of parties. Until September 1st the conception which prevailed was a trichotomy. Parties were either proper or necessary or indispensable and so much sweat if not blood was spent upon defining the correct labels. Moreover, the labels were doctrinaire and they were based on doctrines and they were based on an evolution of legal history of a kind which is quite irrelevant to modern litigation. The federal courts undertook to ventilate this entire area and they really have. They undertook to banish doctrine and to replace it with entirely, I stress the word entirely for I think it fair, entirely functional and practical considerations. Now a party will be joined, that is, his joinder may be compelled, may be ordered under these circumstances. From two reference points of view, two pole starts. First, in terms of the persons already parties: a) If they can't have complete relief without filling out the empty places at the table of litigation or if the consequence of empty seats during the litigation is that a person already a party will suffer or may suffer multiple litigation, i.e. another round with a possible conflicting

result, the missing person must be brought in and, switching places and examining the question from the point of view of the absent party, if he might be concluded in absentia he ought to be brought in. Incidentally, "might have concluded" in a former era of litigation in the federal practice, 1966 and before, quite definitely meant bound by standard res judicata doctrine, but who normally can be bound by res judicata if not actually a party to the litigation whose judgment is sought to bind him? So the term bound had an inconclusive and defeating effect. In its place now the word practical has been substituted. If the practical effect of a judgment is to inhibit the legal position of an absent party, then he must be brought in. Always assuming you can find him. Now, a court is told to fill out the places at the table of litigation up to the point where these requirements, these two sets of requirements are satisfied, and once you reach that stage and there are still missing parties, the courts' obligation then is to say on balance, should we proceed or should we not? It is only if the on balance judgment is there simply aren't enough to justify serving up a dinner of litigation that the court then says, the missing parties from our point of view is indispensable to the further conduct of the litigation, and we arrest it all together.

Incidentally, while the word "indispensible" survives in that adverbial connection, the actions of a party are under no circumstances to be given jurisdictional force, i.e., a defect of parties is no longer in any conception to be given the force of a defect of subject matter jurisdiction.

What are the consideration by which the court attempts to strike a balance?

I sometimes think the catalogue is not fair to the very splendid corps of judges who sit in our courts until I reflect it was copied from the federal rules and they have a far more assorted group of judges whom to lead by the hand. There are four identified categories and it would take some considerable time to explore them. Every one of them has this common characteristic that it appraises the practical ability of this litigation to discharge its intended function against the option. The option of course is to send the parties somewhere else where the opportunities for comprehensive litigation may be even poorer. I trust I have made my point with you and that is, there is a new day in the area of parties and that new day is practically oriented. Labels don't matter. The substantive consequences of collecting parties, leaving them out, deciding to continue or not are the things that control and I doubt very much whether any past precedent will be particularly illuminating for you.

We come into another area where the same storm of fresh air has intruded. Class actions are an entirely different article. I suspect there are very few who among you bring more than one class action a year. On the other hand, given the direction of our society, the ever larger involvement of group interests in a thousand connections, and class action procedure is obviously the avenue of litigation of the future. Well, towards that future, another conceptual trichotomy has been banished. Professor Moore just to recall to you the influence that a professor can sometimes have, invented labels for the three categories of class actions then. He called one true and the next was hybrid and the third was spurious and from that point on the name of the game was to find the right label. When you did, all your answers weren't solved but at least that was the way it began. Well that trichotomy has been abolished too. No one can prevent new labels from being invented, but the character of class actions now is first, they begin with an unmistakable identification as a class action. They continue where they set up preliminary standards, again eminently practical considerations that have to be evaluated. Is a class action procedure the appropriate procedure and is there another better one? In substance, it comes to that. Moreover, are the class representatives people who can be trusted to carry the flag into the battle of litigation? Once you are past those

requirements, you next determine whether the subject matter of the controversy fits class action procedure. And here, by and large, the categories stack up about as follows:

The first group is where there is a fund that might be exhausted by conflicting payments or where there is a defendant who ought to be governed by a common standard. Think of, for example, an insurance company with thousands of policies of a particular class and the job of allocating a part of surplus to dividends on that particular group. Clearly multiple conflicting judgments would stultify the entire corporate process and so this is typically a case in which the possibility of conflicting judgments makes class action procedure binding upon the class as a whole appropriate.

The next is new. It was quite definitely invented for the type of litigation of which civil rights litigation is an example. Cases in which the defendant takes a common position towards an entire class, for example, the school board decision deciding to integrate or the reverse. Formerly each offended or aggrieved litigant had to pursue his remedy alone and now class action procedure is specifically identified as appropriate.

The third is the one I like best. The third is the one which I think is the wave of the future. Here there are large and dominant common questions and

a class action is the superior way to proceed. Consider by this description a regional accident. I can recall one. A dynamite explosion down at Perth Amboy at the docks in a railroad car injuring an immense number of persons and damaging a great deal of property. According to this conception, the common issue of liability would be appropriate for class action procedure. More instances could be invented. Indeed, that is the point of the change. There are no a priori prohibitions for class action procedure. Get numerous parties, too numerous to litigate individually effectively, get a case which sits within these broad categories by a practical evaluation and you may approach class action procedure. Now, one safeguard in the last category that I described, i.e., a common thread of fact, and a context which makes group litigation, class action procedure, appropriate and the reservation applicable only to this first type is that any one person, in the first place, all members of the class must be notified; that will probably be the procedure established by class action, but it is the commanded procedure as to this. And secondly, any party notified is entitled to vote out. He is entitled to say, I do not wish to participate and by taking that affirmative action he disclaims the binding force of the judgment upon him as a class action judgment. It may turn out that there are other ways in which a person can be bound in absentia but the class action judgment may not go against.

On the other hand, he may take two other positions. One is he is content to have a class action procedure govern his rights or that he is willing the class action procedure should go on but he intends and wishes to speak for himself in which case he must be admitted to do so as of right. Clearly if I haven't begun to do anything more than merely acquaint you with the existence of a topic. In two years, there hasn't been any considerable experience with the working of this new procedure in the federal practice, but I do tell you that if there is any area of rule changes in which it can truly be said a new day has dawned, this would be it. And I think it to be a momentous new day.

Intervention is another topic in which exactly the same influences now operate borrowed again from the federal practice. Here too intervention permissively, that is, at the court's option, has been a practice which, by my experience, courts have kept within fairly tight bounds.

Mandatory intervention has been another matter. Here it has been necessary to say: "I will be bound," and then to follow, "because I will be bound without my being a party, I demand the right to be heard." The rule now says it is entirely unnecessary for mandatory intervention, to be bound in the sense of res judicata precluded. It is necessary to say the practical effect of a judgment will be to inhibit or to limit my practical litigating position. You must say

that and you must add something more. Those persons already in the cause who represent my interest are not effective or accurate or numerous enough or inspired or interested enough. You must demonstrate the inadequacy of the existing representation from your point of view, but given the double barreled practical demonstration you are entitled to, admission.

I come now to another topic, also dealing with joinder of parties and this one is new. It bears a label which is new to our practice. That label is "virtual representation of future interest." Virtual representation is a coined name for a special type of class action, and it is special in the sense that it is an ersatz type, not quite the genuine thing. What happens is that a party who is not identified as a representative and doesn't have a Mr. representative badge pinned on him or a Mr. representative fiduciary obligation expressly assigned to him is identified after the judgment has been handed down as a person who is all along representing a class. From time to time out of necessity or oversight the probate bar having taken a judgment in a will construction for example, then argues later on when applying for a title policy to a title company, that judgment is perfectly valid against the unborn members of the class for whom no guardian was appointed. If they were making that argument to a court, it might very well prevail because there are precedents for this ersatz type of class

action. But title companies, as you know, reserve right to reverse courts too and their attitude is, show me in a rule or statute or so far as I am concerned, it is no good. In order to help the probate bar to cope with some title companies, two fairly limited situations of virtual representation have been identified. If in a particular case you have a group of remaindermen following a series of life estates, you may litigate against those who take as remaindermen today, if the boom fell, and argue later on that the judgment you take is conclusive of the class which eventually succeeds as remaindermen, including persons unborn when the litigation occurred. And you may do the same thing as to appointees under a not yet exercised or not fully exercised power of appointment. In this case by the device of joining the appointee along with the donee of the power. Let me say that again since I think I may have confused you about it. The second instance of virtual representation is to name as the defendant the donee of a power of appointment, i.e., the one who has the power of appointment and in so doing, you will thereby bind subsequent appointees, designated but through the exercise, future exercise of that power. I will say this about the procedure and that is, if it were I, I would use it only at the point of a gun. There are so many genuine class actions provisions in the rules by now and they are so preferable in their fidelity to due process, i.e., by identifying the

representative of absent parties and charging him with a formal responsibility to represent them that I would personally prefer if I didn't have to, to use the ersatz variety. Real party in interest. 4:26-1. All that has happened affirmatively is that an express trustee can now be sued alone as formerly he could sue alone. This is a very long overdue system of reciprocity. What also happened is a battle waged and lost. There was a good deal of argument at one judicial conference for the proposition that it was time that insurers, particularly in subrogation cases, came out of the shadows and litigated in their own names as the real party in interest and after a lot of fervent debate, what happened was, it was lost.

The next topic I have is process and service. The rules here are 4:4-3, 4:4-4 and 4:4-5. What the rules specifically do by way of change is not much, but the changes should be pointed out. First, 4:4-4 has been relabeled descriptively to read in personam. It is the kind of service which we employ to predicate a personal judgment. 4:4-5, in rem or quasi in rem. It is the kind we use where we can't get the better personal jurisdiction. Second as you heard from Mrs. Pressler you may wind up by ordinary mail after instances in certified mail or registered mail is employed simply are not effective, simply don't achieve service. By the way, certified mail can be used now routinely in place

of registered mail and that is a change of importance I am sure. And next, this is helpful and instructive, a descending order of priority of methods of service has been established so that where in a particular paragraph of 4:4-4 you see sequences followed by "or," that is a whole catalogue of methods, alternates, for service, for example, upon a domestic or foreign corporation. You are now told they are being listed in an order of priority and you don't get to a lower one until you have exhausted the top one in a diligent manner.

Published notices have now been cut from four to two insertions. When I unfurled these changes to the class at law school, I got a question something like this. You have told us haven't you, sir, that mail service is constitutional. I said, yes, we certainly use it for extra-territorial personal service and invoke it as a basis for a New Jersey court passing a binding personal judgment against a non-resident. Fine. It is official, isn't it? I said, yes, the postmen are officials, federal, but not state officials. How does it compare in cost with what you must pay the sheriff? A good deal less. How does it compare in time? Well, it is speedier. And how does it compare in authenticity? A little better because very often the receipt is signed not infrequently by the defendant himself. Well, he said, if you can do all of these things in order to take a personal judgment against a non-resident served abroad, what are we waiting for?

Why don't we use it in New Jersey to serve our own citizens? My answer was, I don't know. Perhaps you don't. The substantial development in the area of process is not in the Rules. It has been in the decisions and it would take some time to develop those. They are all in the area, chiefly in the area, of long arm service. New Jersey stands preeminent in its professed intention to exploit long arm service through the Rules as distinguished from statutes to the uttermost limits to which due process comes to unfold and we have had decisions in this state which I think are the sentinal decisions in the area, including, well, no point in my telling you whose they are since time won't permit my relating them to you but there are three which make New Jersey preeminent in literature on the subject, except in one section, of long arm service. And that is the do it yourself kind. It is becoming very popular now. The license for the do it yourself long arm service is National Equipment Rental v. Szukent, 375 U.S. 311. It is the device of writing in to a contract with a non-resident the irrevocable designation of a local agent for the acceptance of service of process. By a divided court, the U. S. Supreme Court, upheld such a designation when the designee was the secretary and wife of one of the officers of the vendor who later invoked this appointment in order to sue in Long Island against a Wisconsin farmer. Now, if the United States Supreme Court will sustain do it yourself long

arm service under those circumstances, I can't imagine what won't pass and so this is another device which to date has not been used in New Jersey. It is not to be found in the rules, but surely belongs in your armory of service considerations and service procedure.

The next topic to which I come is summary judgment under 4:46. There are two quite deliberate and intended and substantial changes in this area. Now the two changes are: first, to require that where summary judgment is granted the judge comply with the rule that calls for findings of fact and conclusions of law. Well, by hypothesis in granting the judgment, he won't find facts so much as find that there are no facts to find. But he must state his opinions in the area of law and in that respect I don't know that there is a great departure from normally happens now. The next change, however, is this. It has been a justifiable grievance that the summary judgment procedure can operate on particles no finer than the total congeries, complex of issues which make up liability or the same for the complex which makes up damages. Nothing finer than that can be ground out by the summary judgment mill. Moreover, it is impossible, for a combination of reasons, to enter an immediate final and executable judgment for an admitted part of a commercial claim. And that was just plain law. The federal practice was the same. They haven't reformed. We have. The rule and

the comment make it plain that the summary judgment procedure will now grind as fine as any issue meaning any issue which is an ingredient of the complexes of liability and damages. And secondly, very specifically, there may be a judgment intended to be final for an uncontroverted or abetted portion of a commercial claim while the balance of the very same claim remains outstanding for litigation.

If I express a caveat now as I will, not about the policy but about the text, it is only in the hope that the first judge to consider this on September 2nd or 3rd will rule me wrong. As the summary judgment rule is now written, it requires compliance with the split judgment rule. The split judgment rule is 4:42-2.

Split judgments are another coined thing for this situation: Multiple claims in the same case decided in sequence. The rule has long been that whether that is the case, an appealable final judgment results only when the last batter is struck out, i.e., when the last claim has been heard, litigated and decided. And as the rule reads, until that moment every other decision ostensibly final is nevertheless provisional and revisable. In the federal practice and ours until yesterday the rule said that it was possible for a trial judge to recite that there is no just reason for delay and thereby to impart finality to the adjudication of a claim, one or more but less than all. A claim was the minimum unit to which that finality could be imparted. The split judgment rule has been slightly changed in

words. At lunch I had Mrs. Pressler's assurance that the intention was that that change should precisely dovetail with the change in the summary judgment rule, and I certainly hope it will be construed that way, but I do know that if I had to start fresh without the insight I got today, I might find a sufficient resemblance between the present and the former split judgment rule in order to say, now as before, the split judgment can operate on nothing finer than the adjudication of at least a claim against at least some of the parties to the claim.

The next topic is motions for involuntary dismissals. This rule is 4:37-2(b). The federal courts have struggled with this for a while and the solution that they have adopted is to abolish motions for involuntary dismissal in non-jury cases. What they use at the same posture of the case is what they call a motion for a directed verdict. Then they make motions for a directed verdict at the close of the plaintiff's case and again at the close of the entire case. The procedure that they call motion for an involuntary dismissal, they reserve for non-jury cases and they give the judge an option. They say to him when the plaintiff has rested and the defendant moves for an involuntary dismissal, you can do either one of two things. You can send the clerk to borrow the scales which the jury uses when it evaluates credibility and decides weight of the

evidence and proceed to act like a juror. Why wait until the defendant has had his chance to fill out the gaps in the plaintiff's case? You have heard the plaintiff's case. You will ultimately have to decide on the merits by evaluation. There is no jury to do this work for you. Do it now if it seems appropriate to you. And the judge may do it or he may say no, I am going to evaluate the evidence, not evaluate, but sift, for evaluation is the very thing you can't do here. I am going to merely sift the evidence in exactly the same way I would if a jury were sitting in the box and then, as we know, the standard is to take those portions of the evidence and the inferences which they support which militate in favor of the party defending against the motion and by taking that out of perspective in relatively unbalanced view of the evidence, deny the motion, if operating just with those fragments, the jury could find for the party defending against motion. So as I said, the judge is given a choice. We here in this state face south, that is facing precisely the opposite direction from the federal decisions. One, we keep our motion for an involuntary dismissal in jury and non-jury cases just as we did before. There is no change. The motion still operates in both types of cases. But what we have done is we have said to the judge from now on, on a motion for involuntary dismissal with or without a jury, there is only one standard and that is the jury standard. Take the scraps of

evidence though when you come to decide the case finally, you will attach further weight to them, but take them anyway for they support the party defending against the motion. Draw the inferences which, standing alone, they support and they deny the motion. One consequence is that anybody in a non-jury case who makes a motion in any case where there is a chance of it succeeding almost guarantees a reversal on appeal. If the court's intention was that non-jury cases be tried to a conclusion on the well verified by statistics experience that it takes two to prove a case for the plaintiff and that is actually the valuation, why, the lesson will truly come across and so I think as a practical matter, motions for an involuntary dismissal, except in the super-clearer non-jury cases are kind of ceremonial actions merely made for the record and as I say, if they have a chance of succeeding, I wouldn't make them.

There is one thing more that perhaps needs to be said about this particular rule, concerning the appearance in the text of the rule of a standard for decision. This rule now provides the test on a motion for an involuntary dismissal. Mind you, it is also the test on a motion for judgment in a jury case and it is also the test on an appeal from the denial of an involuntary dismissal or the denial of a motion for judgment in a jury case and here's the way it now reads. "If the evidence, together with the legitimate inferences

therefrom, could sustain a judgment;" if I were a man from Mars and I had to say how this test differed from the very different test on a motion for a new trial where evaluation of the evidence as a 13th juror is precisely the judge's function with hindsight, I frankly wouldn't know how to do it. I think this overstates what the constitution permits on a motion for an involuntary dismissal before a verdict has passed. What I confidently expect is that the rule though written in this fashion will be marked down by the first decision to the standards to which we are constitutionally familiar in Malone v. Public Service.

The next topic, new trials and appeals, and the weight of the evidence. The rule number is 4:49. In my view, the only change that has occurred is in a manner of speaking, but what a change. Until now it was necessary in papers, and I was going to say orally but it is a long time since I have heard it reiterated orally, that the verdict was somehow infected by passion prejudice, partiality or mistake. I recall that Justice Proctor saying to me once, if I took that seriously as, of course, I don't, it would be necessary for me to order psychoanalysis of jurors after the verdict in order to discover whether the fact of perversion is ratified or not. All it has ever meant is that there is such a gross disparity in weight between the evidence and the verdict that the verdict ought not to stand and another jury ought to get a chance at it. Now the expression is "clearly and

convincingly appears that there is a manifest denial of justice under the law."

I am sure it means the same thing, i.e., an egregious disparity in weight between the evidence on the one hand and the verdict on the other.

The next rule is amendments which relate back. The rule number is 4:9-3.

Since the thrust of the amendment is limited, very limited, let me merely say what it undertakes to do. For a long time it has been possible after the statute of limitations has run to find and substitute the correct name for a person correctly identified and actually served but merely misnamed and that has been called misnomer. But where there is some reason to doubt whether once the statute has run the substitution merely corrects a mistake as to name and there is a reason to think that the correction may be a mistake as to identity, the statute of limitations has been held to be a bar and a lot of blood has been shed over whether the mistake is misnomer or as to identity. The rule makes that less relevant. For now the principle will be that the amendment will relate back in order to correct the mistake as to identity if the party to be substituted had notice. I think the rule means knowledge, but it says notice, notice of the commencement of the litigation within the statutory period and has not been prejudiced by the delay in substitution.

The next topic is certainly one that none of us would want to ignore.

Counsel fees. Rule 4:42-9. The first item, matrimonial actions. Through the use of an expression which I think is probably unintended and which I hope will not be given the effect that the language literally suggests, the allowance may be made as customary as is just in the circumstances, i.e., against any party and not merely "the successful party." It would be unfortunate if allowances could now only be made against an impecunious successful wife and I am quite sure it won't be interpreted that way. The prohibition against counsel fees in non-matrimonial actions, and that has been a feature of the rules right along, now makes it clear that it isn't a total prohibition of such allowances in cases in which counsel fees have been appropriate in the past. As for example, the non-matrimonial but nevertheless matrimonially related custody actions, counsel fees have been awarded in such cases and are appropriately awarded in such cases now, although that claim is itself not identified as a matrimonial action. In foreclosure actions, you will be delighted to learn that the counsel fee rate at a percentage on sums below \$5,000. has now been upped from 3% to 3-1/2%. The principal development in this area is really not in the Rules. There are a number of other negligible changes in the rules and I hardly think there would be attention in assembly at a group such as this. The big change lies in this. The decision of the Supreme Court in Red Devil Tools v. Tip Top Brush Company,

50 N.J. 76. I am positive that everyone of you who has tried a non-jury case in the Chancery Division since this case came down and being invited to consider settlement may have been reminded that if the case is not settled and tried, it may be appropriate for what now is called a Red Devil counsel fee allowance. That isn't to use a pejorative but merely to identify the source of the new authority. The rule does read as you know, I am speaking now about the cited rule, "no counsel fees are to be allowed except as herein provided," but the Red Devil case has decided that it may be equitable to transpose litigation costs and quite obviously what they were doing was opening a big, big wide door wherever equitable considerations point in that direction. Where it will lead nobody can say yet. The circumstances of the case were these. Red Devil spent a lot of money and sweat building a fine reputation for the term Red Devil in connection with one product used in the building trades, tools. Now the defendant made brushes which the plaintiff had no interest in making and liked the name Red Devil and thought it helped to sell the brushes where they liked to see them bought so they just lifted the name. When litigation resulted, the plaintiff clearly prevailed on an injunction and everybody was agreed that that much was right. Thereafter the trial court casting about for something that would fit said, I am going to order an accounting for profits. No use awarding the plaintiff damages since the

plaintiff had none and there is a great deal of doubt about whether punitive damages claims can be litigated in the Chancery Division or can be associated with the grievances of an equitable controversy. So an accounting for profits, whatever the defendant made, ought to go over to the plaintiff. The Supreme Court said that really is highly inappropriate. It doesn't fit the plaintiff's loss and it doesn't necessarily have the dimension of appropriate punishment for the defendant. It would precisely redress one item of the plaintiff's grievances, if the defendant at least had to pay what the plaintiff reasonably spent in order to come here and get the injunction. And so the award was made. I am sure nobody would quarrel with the inherent equity of it. All that I say is this has opened up a new chapter and a new day in the matter of counsel fee allowances in equitable controversies and it has created a large unwritten exception to the written generalization in the rules yesterday and today that no counsel fees are to be allowed except as heretofore.

The last item that I am going to mention has to do with the rule by which business is allocated between the Law and the Chancery Divisions. That rule is 4:3-1. As it is now written, it was a three step rule and the substance of those three steps was to take something that was clearly, distinctively, and virtually solely equitable and say Chancery Division. The converse: distinctively and

exclusively legal, Law Division. For the hybrid there was a litmus paper test. Drop the action which has both legal and equitable claims into some kind of a bath, insert the paper and if a predominant character or the principal relief is equitable, Chancery Division, and if the appraisal gave you the opposite result, Law Division. And what were the odds? It meant a different judge or a different set of judges, but mode of trial to a jury or not, as you know, doesn't conceptually depend upon the division you are in, although practically it may matter. So that was the third rule and what the change has been is to scrap the first two and leave us with the third. It doesn't matter. If you use a hybrid rule on the pure product, you get exactly the same answers as you got before, so one rule will serve the place of three. The problem is not with the rule. If I have a caveat it is with the comment on the rule. The comment said that the change was being made because as the rule was originally written it kept thrusting a spark into the antiquarian research as to whether the action was of a kind which would have been accepted by the former court of chancery September 15th, midnight 1948 when the last batch of new rules went into effect. And, said the comment, why bother, that history is receded into the past. It really isn't relevant today. With great respect I differ very fundamentally. I think it highly relevant and let me tell you why. As the rules are written now and yesterday the constitutional right of

jury trial is matched by a right defined by the rules of non-jury trial and that right of non-jury trial according to the rules and decisions takes off exactly from where the constitutional right to jury trial ends. Now add one thing more, that as you know an equitable claim has the process of metamorphizing, of sorting and altering the character of associated dependent legal claims, i.e., a dependent legal claim in an equitable context falls into equity's orbit, of adjudication and mode of trial, i.e., non-jury trial, so that a legal issue is triable to a jury or not depending upon whether it stands alone or sits in an equitable context. Only history can give us the answer. True, I would hope that equity has moved forward since September 15, 1948, but wherever equity stands today, the mode of trial is non-jury and the history is normally the first source of effort, so any of you who still have Pomeroy, dust it off and even the old Kocher and trial volumes may have some use.

JUDGE TISCHLER

Thank you. I just want to add a few additions to Professor Schnitzer's talk and then we will take a five minute rest period. Some of the rules I see that are important and have changed the previous practice. 4:7-1. One that Professor Schnitzer took up, 4:26-1, that a trustee may be sued without joining the cestui. That overrules the Supreme Court case of Paradiso v. Mazejy, 3 N.J. 110.

Formerly if a trustee owned real estate, you had to join the cestuis. This rule now says that you need not join the cestui. 4:26-3, notwithstanding the virtual representation rule, you still may have a representative for unborn parties if there is any conflict of interest. 4:26-6, you now may sue persons by initials. If you know it is J. Smith and you don't know his full Christian name, you may sue in the initial. 4:26-7, public officials may be sued in their official titles. 4:37-1, the two time dismissal rule has been abolished. Formerly if you dismissed an action twice, the second dismissal acted as a dismissal by prejudice unless the court reserved, provided that it was without prejudice. 4:37-1. Professor Schnitzer discussed summary judgment. Judgments on the pleadings has been abolished. We no longer have that. Maybe I am intruding on other territories. However, we will take a five minute break and be sure to come back in five minutes because we have a long program.

JUDGE TISCHLER

Gentlemen, due to the importance of the subject we expect to go until 6 o'clock. You are free to leave earlier, but we have a very intense program, and it is almost impossible to cover everything. In fact, I have been asked to let you know, and perhaps Judge Matthews may cover, but I think it is so important, Rule 4:64-5. I can summarize it very quickly by saying that no longer may a suit

be brought on a promissory note secured by a mortgage unless there is first a foreclosure of the real estate mortgage or that the mortgage which secures the note has been wiped out by a prior mortgage. I could spend half an hour on that because I wrote considerably on this subject. The Supreme Court did not follow my suggestions but now the rule does.

The next panelist is an active practitioner at the Bar. He has been actively engaged as a member of the Supreme Court Rules Committee for I don't know how many years, longer than I have been and I have been on it for more than ten years. In 1948 he edited an article on discovery in the book that was known as, The New Practice. He is a co-author with Morris Schnitzer of: SCHNITZER AND WILDSTEIN ON THE NEW JERSEY RULES SERVICE. He too is a trial examiner in the Civil Rights Division. Has written some of the very most important decisions, all of them having been sustained by the Supreme Court. I am particularly pleased to introduce my good friend, Julie Wildstein because two years ago he and I shared the moderating of the program on the tentative draft of the rules. He will discuss part 4, particularly motions and discovery. Mr. Julius Wildstein.

MR. WILDSTEIN:

Some years back I was addressing a bar association meeting in Morristown and some lawyer got up during the question period and said to me, Mr. Wildstein why

did you pass this rule, and then he proceeded to go into a long harrangue as to what that rule did to the practicing attorneys. I am not responsible for the rules, although I do have some part in it, but I can assure you that the Supreme Court in this last session for four days went over these rules with a fine tooth comb and many a time I was knocked down on my suggestions so you can be sure that I am not the author.

With respect to 4:4-6, a young man aged 20 years and 11 months cannot acknowledge service on the summons, even if he does want to waive formal service. This is the rule in the case of McKay v. Abesan, 82 N.J. Super. 92 which the court has now written directly in the rule by saying that the service by an infant or an incompetent cannot be waived.

You cannot make a general denial and I am referring now to 4:5-3. You cannot make a general denial, such as "defendant denies each and every allegation in the complaint." That is out. And it is out because the lawyers abused it. Now you have to meet, says the rule, each and every allegation in the complaint or in the claim when you answer it. Either you admit it or you deny it or you say you have no information sufficient to form a belief. If you violate the rule, it would appear to subject the attorney to disciplinary proceedings or contempt of the court. There will no doubt be abuses, but it at some time along the line the

Supreme Court will speak out and speak out loudly against the practice. There is no reason for general denials to an entire complaint.

Affirmative defenses 4:5-4. A defense, for example, saying that the plaintiff is barred because of estoppel, is not permitted under the new Rule 4:5-4. You have to set up facts which give rise to the affirmative defense. You don't merely state a conclusion of law.

4:5-8, pleading special matters. This rule is intended to clear up some confusion as to whether or not when you are required to plead items of special damages does that mean you have to give the money damages when, in fact, under another rule unliquidated claims cannot state any damage amount. The rule now says that what you do is specify the items without giving the money amount. For example, in a libel suit if there is a breach you must set forth that the loss of business was the result of the libel, that is, that is the nature of the loss of damage that you state. You do not state the money claim. You merely state the fact of what the actual special damages are.

4:6-1, respecting the order permitting the extensions of time after a 30-day extension has been given by consent, now requires that the order state good cause, actually state what the good cause is. This has been eliminated and all the rule says is that you have got to persuade the court to extend you the

time and that judge must find good cause. It need not be stated in the order as heretofore.

Now with respect to required motions, and I am dealing now with the motion practice with respect to motions for lack of jurisdiction over the subject matter, lack of jurisdiction over the person, insufficiency of process, insufficiency of service of process, failure to state a claim upon which relief can be granted, and failure to join a party against whom an action cannot proceed. Those defenses which I have listed, under the present practice if you did not make any motion, you could set those defenses up in the answer and then you would go to pretrial and for the first time the court might take notice of the fact that there were these defenses. Now, you can well understand that a lack of jurisdiction over the person, service of process, if decided at the last minute or decided right at the pretrial or shortly after that, would result in this possible statute of limitation running. And this is a dilatory practice which the court has taken notice of in several cases and finally now has brought to a conclusion by saying that if you set it up in an answer, that is, provided you have not made any motion prior thereto if you set it up in an answer, that defense must be disposed of within 90 days of the filing of the answer. I am now referring to the lack of jurisdiction over the person and insufficiency of process. That is Rule 4:6-2,

and 6-3, they are both related. Now as to the defenses of the lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted, and failure to join a party without whom the action cannot proceed should be heard and determined before trial in order to get rid of as early as possible these important defenses dealing with the merits.

Now there is another very important rule in 4:7-1, dealing with the mandatory and permissive counterclaims. Here, the change is that you are not permitted to make to a non-german<sup>are</sup> counterclaim in a foreclosure action. This has now been flagged into the rule. Normally, counterclaims are as broad as they are long. You can assert anything in a counterclaim subject to what Morris discussed earlier with respect to the entire controversy theory. This merely flags that in foreclosure actions you are restricted. Set off is still permitted.

Now 4:7-5 dealing with cross claims against a party permits 90 days breathing time to decide whether or not you want to file a cross claim. The 90 days begins from the time the defendant is served with process or within 90 days that the defendant against whom the cross claim is to be asserted was served, whichever is later. The purpose of that change was to permit a defendant to decide and determine what his position should be with respect to cross claims. After that 90 days period has expired, you can only file a cross claim by leave

of court, and providing that the copy of the proposed cross claim is annexed to your motion for an amendment.

Now we go to another important change which I think the attorneys may like and that is Rule 4:8-1, third party actions. Under the present rule, as you know, leave of court to implead a third party is necessary. Actually in practice most of us know that this became a formality because rarely were they resisted. Following the suggestion made in the Federal Rules, leave of court is now unnecessary to file a third party claim, provided that the claim, the third party claim, is filed not later than 30 days after the answer has been filed. You have 30 days after the answer to file as of right, a third party claim. After that, after the 30 days have expired, then only by leave of court. Now the new rule further provides that the third party plaintiff serves a copy of the complaint, third party complaint, upon the plaintiff within 5 days after service of that third party complaint against the third party defendant. In other words, within 5 days he should serve a copy on the plaintiff. Of course, copies should be served on all parties.

On to another rule, after the third party is joined, the procedure is the same as under the present practice, except for one change. Under the present rule there is a provision that a claim may be filed by the plaintiff, the original

plaintiff, against the third party defendant if it arises out of the same transaction, as a common question. In other words, a germane claim. It has always been a problem, what to call that kind of a claim. Now, under the new rule what happens is that the plaintiff, the original plaintiff, files an amended complaint in which he makes his claim against the third party defendant. That claim is permitted as of right within 20 days after the service upon him of the third party complaint. I reiterate. The original plaintiff, once he receives a copy of the third party complaint, has the right to file an amended complaint within 20 days thereafter against the third party defendant on a germane claim, that is, germane to the claim which he, the plaintiff, asserted against the defendant.

A new practice has arisen, although it really isn't new. It is new in the rules, that when an amendment is made to a claim or to any other pleading or supplemental pleading, the rules provide. 4:9-1 and 4:9-4, both provide that copies of the proposed amended complaint or amended pleading or copies of the proposed supplemental pleading should be annexed to the notice of motion for leave to amend or to supplement. This is really an old practice which was favored way back in the Grobart case and although followed by some, has not been followed by all. The Supreme Court felt that this should be the rule so that the court knows what the substance of the amendment is before it grants leave.

Depositions pending action. 4:10-1. A change has been made to permit the taking of depositions within 20 days after the service has been made. The rule heretofore was 20 days after the commencement of the action, that is 20 days from the date you filed your complaint. So that a wise plaintiff could delay service of process on the defendant, let the 20 days go by from the commencement and then turn around without leave of court and before the defendant has an attorney, serve him with notice to take depositions and gets the jump on the discovery period. This the court wanted to correct and, therefore, the 20 days begins to run from the date of service.

4:14-1. The rule emphasizes that depositions are to be taken at a time and place which is reasonably convenient for all the parties. Now, in three different rules the Supreme Court has gone out of its way to insert language such as I have just read, "reasonably convenient for all the parties." There has been an abuse of that, and this is what the court now wants to correct. I will come back more to that later in dealing with experts.

4:14-3. The rule codifies what has been the practice, that all the parties to the action must waive in writing the necessity for transcribing the testimony, otherwise it must be transcribed unless all the parties waive it.

4:14-5 makes a very necessary and I think a good change. Heretofore the reading and signing of the deposition was necessary unless the parties stipulated it in the record before the stenographer who was taking the deposition and once in a while you got a wise lawyer who said, no I won't stipulate. Therefore, at the end, you would have to have the testimony transcribed and submitted to him for his signature and he would read it over and make corrections, etc. Now the court has said that you automatically waive the signing and reading of the depositions if you have a certified shorthand reporter taking the depositions. There is no difference in open court at a trial if you have a certified shorthand reporter, why should it make any difference in your deposition hearing and I think this is a good change.

Now the present rule, 4:14-6, requires the adverse party to receive a copy of the depositions after they have been transcribed and if there are more than one party, adverse party, then one party is entitled to receive the depositions. There has been some problems arising as to what happens after the adverse party has received a copy and there are other adverse parties. The court clarified that by saying the adverse party to whom a copy is furnished shall make it available to all other parties for their inspection and copy.

The subpoena for taking a deposition. 4:14-7, so far as lay witnesses are concerned, now makes it clear that a witness as distinguished from a party; and by a party, I include managing agents, officers or directors who stand in their shoes, lay witnesses as distinguished from a party are entitled to be reimbursed for out of pocket expenses and for loss of pay, if any, incurred as a result of their being required to attend the deposition. That is a very important rule. I will cover depositions of experts later.

Interrogatories to the parties. The present rule which permits the official form to set up the interrogatories for personal injuries and for property damages in motor vehicle cases is 4:17-3. It does not contain any interrogatories addressed to liability as did the district court forms. That is the present rule. Under the new rule, 4:17-3, if you look at the form which will be attached to the rules, you will find a form that goes into liability as well, so that liability questions in the category mentioned, namely, interrogatories for personal injuries and for property damages to motor vehicles, in those categories the first set that you must ask is the questions listed in the official form. However, now as under the present rule, supplemental interrogatories may be demanded subject to any protective order which you may get. The point is that the set of uniform interrogatories must be used first, if any are to be used at all. From that point

on, you can add and you can ask other questions from time to time as in the case of all other interrogatories.

Objections to interrogatories, 4:17-5. The present rule puts the burden upon the party upon whom the interrogatory is served to object to the propriety of the question by requiring him to move to strike the interrogatory within ten days of such service. This rule has been changed to give an option. The party on whom the interrogatory is served has the option of first objecting to the question by saying the question is improper. In such cases the propounding of the question may be disposed of within 20 days after the service of the answer by a notice of motion to compel an answer and if granted, the question must be answered within such time as the court directs. The second option is as was before, namely, that the person who doesn't want to answer brings on a motion but here it is within 20 days instead of 10. We got 10 more days from the court. He moves then to strike the interrogatory on whatever grounds asserted and the hearing must be brought on at the earliest moment. Now the rule mentions what the sanctions are: they may consist of reasonable expenses, including attorneys fees. Now they spell that out. It wasn't there before. The rule merely said costs as are just and proper. The Supreme Court wants you to know that you may be subjected to attorneys fees and reasonable expenses if you make a frivolous motion or if you

resist a motion frivolously in a case of objections to interrogatories.

I now come to 4:19. 4:19 is a new provision which limits the reexamination before trial in personal injury cases to an application made for good cause shown and where the examination will not delay the trial. Heretofore you were entitled to one examination by leave of court and usually at the pretrial you would get another one. Now the defense attorneys felt that there should be an automatic reexamination 30 days before trial. The court rejected that and now wants to be in control of when the reexamination will be granted if at all. Therefore, it now requires that you make an application, show good cause and show that it will not delay the trial.

Now, in matrimonial matters under the present rule leave of court had to be obtained to take depositions or to file interrogatories only in divorce or nullity actions. In the case of separate maintenance, you will recall, no leave of court was necessary and the general rules of discovery apply. There was some controversy as to the logic of that and indeed the Supreme Court was quite surprised to find out when one argument was made before them that there was such a difference and why was there such a difference. The rule has now been changed. Under 4:79-5 all interrogatories whether in divorce or nullity or separate maintenance may be served as a matter of course. This is quite a change. Just as in any

other case of non-matrimonial matters. However, for the taking of oral depositions in any matrimonial case, whether it be separate maintenance, divorce or nullity, you must get leave of court. Now I caution you that even though the rule seems very broad insofar as the scope of interrogatories are concerned in divorce and nullity cases, and now you have it as of right, I caution you that the court will not permit you to pry too far into the actual conclusions which deal with divorce, such as adultery. You may run afoul of privileges. Proceed with caution when using interrogatories in matrimonial matters.

In a pretrial conference, 4:25-1, the new rule adds a new category of actions to be pretried. That is, divorce and nullity, when requested by a party or on a motion of the court. In other words, either party to a matrimonial divorce or nullity action may request a pretrial. Or the court may require it. The present rule excepts from the rule any pretrial dealing with divorce and nullity. I am told that is only in the court's discretion, even if one party requests it.

Now in the pretrial memorandum under 4:25-3, a change has been made which requires submission of the pretrial memorandum to the pretrial judge no later than 3 days prior to the conference. This was the rule in Chancery and now has been adopted in all cases. The rule adds a new requirement that you attach to your pretrial memorandum copies of the factual and legal contentions that you are

going to make, two extra copies for the court and one extra page for each party so that the court at the pretrial can take your version of your factual and legal contention and attach it to the pretrial order instead of waiting for it all to be typed up.

Now I come to a very important rule. If I were asked to state what was the most drastic change in the rules, the trial rules at least, I would answer by pointing out that the new rules for taking of depositions of experts and obtaining copies of their reports by way of interrogatories is the most drastic change.

4:10-2. Since September 15, 1948, when the rules were first adopted, by specific language the rule made immune from discovery "the conclusions of an expert" except in a case of medical reports which, as you know, a party being examined by a doctor has the right to demand a copy of the report from his adversary as to that examination and once that is demanded, that opens the door and the other party can in turn seek copies of your doctor's reports. That was the only exception to the rule that the conclusions of an expert were immune from discovery. Now in 1948 there was the Hickman v. Taylor case which was eventually brought to the Supreme Court of the United States and there was a rule drawn by the federal advisory committee who thought that the proper rule in the face of that case should read what appeared in the rule that we adopted. We adopted the proposed

amendment to the federal rules which carried with it the language that conclusions of an expert were not discoverable into our rules, although the federal rules never adopted it because Hickman v. Taylor was appealed to the Supreme Court of the United States and it did not want to adopt an amendment while that case was pending. So we had the situation where the federal rules didn't have it but New Jersey rules adopted it, and this has been the practice until, gradually, there has been some let down with respect to the taking of depositions of experts. The argument is given that the skill and knowledge of an expert are his own property right and cannot be taken away without his consent and payment therefor. The Supreme Court has met that by saying the party calling for the deposition of an expert must pay for it and if he cannot agree with the expert as to what he is to get, the court will fix the reasonable fee for his attendance. So it took care of that complaint. The second one is often said is unfair for one party to cash in on the fruits of the professional work product of another paid for by his adversary. It is true, the party whose expert testimony you wanted to pose was hired by somebody else, but the fact remains that we have a trial to ascertain the truth and therefore the court said we are not going to pay any attention to that business about cashing in. The third argument is that the expert is acting as the agent of the attorney who retained him, which is true and the Supreme Court

said, so what? Fair? In fact, in Starr v. Berry, 25 N.J. 573, Chief Justice Weintraub said, we could have really caught it then, when he said the provisions of R.R. 4:16-2 with respect to the reports of the expert being insulated from discovery are subordinate to the primary principal that a party is entitled to know everything he needs to enter the court room prepared to meet his aversary's case. Now that was said by the Chief Justice in 1958. However, that was in a case where the very issue in the case in Starr v. Berry were the reports of the timberland experts which was made but what issue in the case which I think is quite a different case. Now the rule refers not only to experts, but also includes treating physicians and very deliberately so. If you look at 4:14-7(b) you will find that the treating physician is captioned along with the expert so when we speak of an expert, we are talking also of the treating physician. 4:14-7(b) talks about the treating physician or the expert's fees. It is subpoena rule but they talk about treating physician. I am pointing out to you that the rule referring to the taking of discovery of experts does not itself mention treating physician but it is covered, it covers treating physicians who theoretically may not be an expert in the sense that he may have observed the facts. He took a history which is factual. It is only when he gives his opinions that he becomes an expert and to make it clear I am pointing out to you that the rule with respect

to experts, whenever I mention experts, I mean to include the treating physician. This was the intent of the rule and a few rules that discuss it pointedly use the words treating physician and expert.

Now I have already told you that the deposing party bears the expense of the taking of the depositions. The deposition is to be conducted at a time and place convenient for the expert and this is underscored, not only in 4:14-2 but in 4:14-7. It is the intent of the rules that the deposition hearing, if necessary, will be held at the office of the treating physician and if necessary will be held in the evening because the court underscores convenience in time and place. Now the court recognizes that treating physicians and experts such as doctors have a practice and you can't haul them out of their offices during office hours. It would be impossible to pay them for that kind of time. Now I know how you feel. I know how it is going to present problems, but it is either one or the other. Either you permit expert testimony or you don't. And in permitting expert testimony, there must be some kind of circumscribing of the time and place of deposing the expert. Now the taking of the treating physician's or expert's deposition, we will be of very good use if the physician or the expert is out of the state. You are taking his deposition out of the state. His opinion. And you cannot subpoena him into New Jersey. He won't come. At least you have got

his testimony, the same way if he dies or if he is sick or if he is ill or otherwise cannot appear. So it has value. It is true that the defense bar as distinguished from the plaintiff's negligence bar liked this best because the plaintiff's negligence attorney said how can I measure up to the defense bar so far as paying for these kind of depositions. But the court nevertheless, the argument was made, I assure you, this issue was very vigorously discussed, the court felt on balance that the value of the expert's and the treating physician's deposition was worth the price to pay.

Now in requesting a copy, you can request a copy under rule 4:17-1. You can expressly ask for a copy of the treating physician's or expert's report. Now, the one condition is that you offer to pay the expenses of the copy. The form of the uniform official interrogatory annexed to the rule book which you will get provides "annex copies of all written reports rendered to you by any such doctors, treating physicians whom you propose to have testify in your behalf. State," and so forth. Now, then, the rule says you have to add a certification and the certification is "I hereby certify that copy of reports annexed hereto rendered by either treating physicians or proposed expert witnesses are exact copies of the entire report. That the existence of other reports . . . unknown to me and if such becomes later known, I shall serve them promptly on the propounding party."

This was put in because the court learned of several instances, unfortunately these instances create the rules, several instances where a report was given partially or there were two reports, one for the other attorney and one for the attorney who is hiring the expert. The rule number is 4:17-4. The certification is annexed to the form also. Now the sanctions for failure to furnish an expert's report when demanded is that the court at the trial and I refer to 4:23-5(b), the court at the trial may exclude the testimony of a treating physician or other expert if the report is not furnished pursuant to the rule requiring its demand.

4:23-5(b).

Now I want to turn to rule 4:17-1 which I regard as a very drastic change in the rules and one which will cause, I am sure, some problems. During the early years following the adoption of the rules in 1948, it was considered improper for an interrogatory to demand copies of papers, letters or documents. Upon the theory or premise that interrogatories were seeking facts and there is another rule dealing with production of records and inspection of records on good cause shown which was similar to the rule in the federal court. However, as time went on it became the practice for many lawyers to ask for copies of various documents and the attorney who answered them would normally give it to him rather than have to make a motion especially if it were innocuous and especially since the

photocopying machines have become common place. What harm could it do? So the idea was conceived, well, we will try it this way. However, there may be many documents which the propounding party is not entitled to. There may be fishing expeditions. Give me all the correspondence between 1921 and 1946. If it is a simple letter, yes. If it becomes prying into your business, it is of that character, no. The way you object is set forth in 4:17-5(b). You have three options. Option No. 1 - the first option is to answer, of course. Second option, invite the propounder to inspect the copy and the paper at a designated time and place, your office or wherever you want. Presumably this will be done with the only objection to the use to giving the paper is the time and cost of reproduction, even though you may be reimbursed. You don't want to take the time to do it. The third option is to state with specificity his reasons for non-compliance. Here are such reasons. I state them. They are not in the rule. I want you to listen very carefully to this because it is not expounded. Such reasons will consist of the grounds recognized for objection to the production and inspection of documents under 4:18-1, which has not been changed at all. Now it is 4:24-1, but it will become 4:18-1 which deals with the production and discovery of documents for inspection. Now here are some of the objections which I think you can make: The papers or documents are not designated or identified with

reasonable detail so as to reasonably inform the party who is requested to give it what the papers are. Second, the documents sought are not relevant to the subject matter and the pending action. Third, the contents of the paper is privileged matter. (You notice what I am doing. I am using all the reasons which rule 4:17-1 now says you can't have discovery on. I am just translating those grounds on the scope of discovery which interrogatories must be co-extensive within terms of objecting to the giving of the paper.) The paper sought is a writing reflecting the attorney's legal thinking, his mental impressions, conclusions or legal theory. The paper sought is a paper prepared by a party or his attorney, agent or insured in anticipation of litigation. The paper will disclose secret processes, developments and research which need not be disclosed. It should be safeguarded. The document is not in the possession, custody or control of the party to whom the interrogatory is directed. There is no showing of good cause. Discovery of the papers seeks to annoy, embarrass or oppress the party, etc. Now once the party states the reason for his non-compliance under 4:17-5(b), then the propounder, the person asking the question has the burden of making a motion within 20 days after he receives that refusal of compliance to serve a notice to compel compliance with the request or for such other appropriate relief. Now the rules are a little fuzzy here. Since other appropriate relief could be

that the paper be given under certain safeguards, it be sealed or it not be shown to certain of the parties, things of that kind, if it is a secret process. Now what is the standard? Who has the burden on that? I would say that the person propounding the question and propounding the demand for the paper should have the substantive burden of showing good cause for that paper and as to that, for my reasons to it, I refer you to In re Rosa, 35 N.J. Super. 133, where the court indicated it is not demand of the motion that counts but it is the substance that counts and the substance here is the rule dealing with inspection and copying of documents which was never given willy nilly but under certain conditions. Thank you.

JUDGE TISCHLER:

Thank you very much Mr. Wildstein. The reporter wishes to take five minutes to discuss the changes regarding district court practice and some of the younger lawyers will probably be interested in that.

MRS. PRESSLER:

Having been assigned the mechanical rules, I am back to the nitty gritty again. I should have mentioned earlier and I did not, incidentally, that this revision eliminates all official forms except the interrogatory forms which are now an appendix to the rules. There was some talk about a committee proposing a

set of forms which were not official, but which were more expansive than those presently contained. Those forms which required particular information which was not referred to in the rule is, however, now included in the rule itself, for example, wage execution. Everything you have got to put into the form is now in the rule itself. There are, however, no longer official forms.

As to the district court practice, the purpose of the revision of the district court practice was to conform it as closely as possible to the practice in the upper court with respect to those actions in which the district court has jurisdiction. The practice is now almost identical. The discovery distinction is retained, however, mainly that any discovery other than interrogatories requiring order of the court. The conformance of the district court practice with the upper court practice has resulted in these essential changes. First of all, the option of filing an appearance in lieu of answer is eliminated. An answer is required in all district court actions except small claims division and landlord tenant summary actions. However, any kind of response by a pro se defendant, even just walking into the clerk's office is specifically characterized by the rule as an answer. If there is representation, then a formal answer will have to be filed.

To proceed. With respect to the various kinds of motions, Mr. Wildstein pointed out that rule 4:6-3 has this new 90 day practice requiring motions to be brought to dismiss for the b, c, and d defense of what was 4:12-2 and it is now 4:6-2. That practice applies except that the 90 day period is abbreviated to 30 days in the district court. 4:7-5 which gives a 90 day period for the filing of cross claims is also limited to 30 days in the district court.

Incidentally, as to service, the rule in the district court now makes it perfectly clear that the long arm jurisdiction of 4:4-4 applies in the district court if it is jurisdictionally sound. I should also say as to 4:4-4, there is one important change in the rule which was not mentioned and that is a new provision which gives as a last alternative, if service cannot be affected in any of the modes prescribed by the rule, a court order which will prescribe a particular mode of service in a particular case. Now the specialized and tailored court order for service was always part of 4:4-5 which is the in rem rule. It was never in 4:4-4, but it is there now.

One change which was made in the district court rules is renamed consolidation. The old rule provides that if the district court case has been consolidated with an upper court case and the upper court case is settled, but not the district court case, then the district court case gets remanded to the district court. We

now provide that only if the district court is in the same county in which trial in the upper court would have been held should it be remanded. If the district court is in another county, it will be retained by the upper court so you don't have to switch back and forth with counties.

The interrogatory rules are substantially the same now as the upper court rules, except that in all motor vehicle cases you have to get leave of court for supplemental interrogatories to the form interrogatories. The 40 and 60 day periods however, of the upper court practice for propounding and answering have both been abbreviated in the district court to 30 days. Also in recognition of the fact that smaller amounts are in controversy, the \$50. penalty when you have a case dismissed for failure to answer the interrogatories has been reduced to \$25. in the district court. There has never been a time period in the district court rules for the completion of discovery. A time period has now been provided for namely, 100 days in contrast to the 150 days in the upper court.

The sup. pro. proceedings have been simplified by now permitting service of the examination by registered or certified mail. Heretofore it had to be by personal service. With respect to publication in attachment, capias and replevin actions, the district court rules now provide that publication can be dispensed

with if the amount in controversy is less than \$250. That proviso has been eliminated for the reason that publication can only be used if personal service or service by mail is not possible. So if you dispense with publication in the under \$250. case, you have, in fact, provided for no notice in such cases and that is the reason for that abolition.

With respect to motor vehicle actions where the amount in controversy is less than \$200., this is part of the revision of the statute dealing with small claims. There are certain ways in which the motor vehicle cases and small claims would be handled differently from other small claims actions. No. 1, the summons in the small claims action sets a return date. That will not be done in the case of motor vehicles actions in the small claims. The court will set the date. The reason for that is that the date is ordinarily set between 5 and 15 days after service of the summons and the carriers feel that they need more time to investigate. There is, of course, no discovery in the small claims division. We have also therefore provided that in motor vehicle cases under \$200., even if there is no small claims division in that county, there shall be no interrogatories. Otherwise the practice in the small claims motor vehicle cases would be identical. That just about covers the district court practice. Anything I haven't mentioned, it will be exactly like the upper court.

JUDGE TISCHLER:

The next subject of discussion will be the provisional and final remedies, matrimonial and probate actions. The next panelist is one of the youngest of the male members of this panel. He is the son of a great matrimonial judge and was appointed judge of the Essex County Court in 1960 when he was too young to be sworn in and had to wait a number of months before he could be sworn in. In 1963 he was appointed a member of the Superior Court and is now assigned to the Chancery Division in Hudson County. He was formerly a lecturer of Rutgers Law School. It seems that a number of us have been at that school. He was Chairman of Chapters 8 and 9 of the Revision of the Rules. Recently he was recipient of the Rutgers Alumni Award. I am very happy to present, his Honor, Robert A. Matthews, Judge of the New Jersey Superior Court.

JUDGE MATTHEWS:

I don't know how you get old. I am over 30. But every time Saul Tischler introduces me, I am back in college. We have a lot of rules to cover but actually in these chapters there are not a great many substantial changes. There are a number of small changes which bear watching, but which do not change the practice substantially.

I am going to start with 4:51 which is the capias rule. The important thing to remember about this rule is that the writ of ne exeat or writ of capias are treated under the same rule now. There is no division. Both may be used as mesne process as well as original process in a case. In other words, if you decide during the course of an action, before you have come to the trial, that you have the necessities for a capias, even though you have not instituted the action by capias, that is by arrest, civil arrest, you may apply to the judge for capias during the course of the action. This is a change from the former practice. Now there are some minor changes which are important both as to ne exeat and capias. First of all capias may be used as mesne process. Secondly, it permits the court to take oral testimony before issuing the writ. This is a discretionary matter but, nevertheless, the rule does provide for the use of oral testimony. There is also a requirement that the writ be endorsed with the name, home address and home telephone number of at least two judges so that when the defendant or party is arrested civilly, his attorney may know where to get a hold of a judge to discharge the arrest and satisfy the bond requirements, etc. This will obviate the old device of weekend jail sentences for civil defendants in actions.

The next rule to consider is that of injunctions. 4:52-1. Actually what we have done under this rule is rearrange the language and we have eliminated all of

the fancy language with respect to immediate, substantial, irreparable, etc. You will notice that the rule says immediate and irreparable damage. The standard is the same. However, I think that the language in the old rule tended to confuse, to put in the minds of lawyers that perhaps they had to have something more than a rocking the boat situation or a disturbing of the status quo situation which in reality is the basic reason for an ex parte injunction. Now, under the rule, we have some minor practice changes which, I think are important to remember. First of all, if you come in for an ex parte injunction under the rule now, the judge will say to you, do you know who your adversary is. If you know who your adversary is, the judge will probably call him, tell him what you have applied for over the telephone or if he is at hand, ask him to come in and permit an informal hearing, perhaps in chambers to decide whether he will issue the TRO. Now as a practical matter, this has been the practice of chancery judges over the years in the case of municipal corporations and labor unions. Usually when you have a corporate defendant, there is knowledge who counsel will be, your opposing counsel will be, or who has been counsel for that corporation over a period of years or in your experience in other litigation. Of course, in a situation where it is just A v. B, in all probability you will have no idea who B's lawyer will be or who he has been. So that this section of the rule will

have no bearing on that situation. But the court may reach out and try to find the identity of the lawyer of the other side in order to give him the informal hearing before issuing the injunctive order, the temporary restraining order. This will not be a formal court hearing. Secondly, the rule permits by express words, and in the discretion of the judge, the taking of testimony on the return day of an order to show cause for a pendente lite injunction or on the motion for dissolution, the two day motion for dissolution of a temporary restraining order. This has always been the practice in the chancery division but the rule has never expressly stated it and it has been my experience in six years on the chancery bench that most lawyers were unaware of this right that they had. I would suggest as a practical matter that if you want to produce testimony at a hearing, that you contact the judge in chambers first to see whether, based on the papers that he has received from you, that he will desire testimony or thinks that it is necessary. And I would suggest that you be prepared to tell him why you think testimony will be necessary.

Another rule I would point out to you is 1:6-6 which gives you the right to cross examine an affiant on motions. Of course, motions for summary judgment as well. But in an injunction proceeding, you have the right to cross examine an affiant and of course, that would be the affiant on whose papers the temporary

restraining order was issued. I believe under the rule that while it is discretionary with the court, I think the discretion must usually be exercised in favor of granting the right of cross examination on such a sensitive issue as a temporary restraining order.

The important thing to remember is the form and scope of the restraining order. As you know, the order is prepared by counsel and in the ex parte situation, the court has to depend upon your pleading, your verification, to support the language that you draw in your injunction. You are the only one that really knows what the case is about at this point. You are the only one that really knows the extent of the relief that is required. I suggest to you that if you serve a temporary restraining order on an adversary, on the defendant, and it is too broad and goes beyond the needs of your client, perhaps it has no relationship to the real cause of action. Violations of that order are going to be treated by the court on a motion to enforce the order or on a motion for contempt in a very cavalier manner because the judge will feel that he has been had. This experience is an experience the chancery judges have quite frequently. So if you want an order to stick, if you want the order to be meaningful and really grant the relief and preserve the rights of your client, I would suggest that the order be drawn

with extreme care and that it be drawn tailored to exactly what you need and nothing more.

Now another practice feature of this rule is that it permits you to file an order to show cause with your complaint returnable on a motion day, seeking a pendente lite injunction, where no temporary restraining order has been asked for. Now this seems like a tempest in a tea pot, but it actually is a very important change in the rule. Our experience has been that, in some counties, when you file a complaint, issue a summons and then file a notice of motion as the rule presently requires with a brief asking for a pendente lite injunction on a return day, the sheriff will hit you with double fees, in some counties. First for the summons and complaint and secondly for the notice of motion and brief. For some strange reason, and I guess it is before my time, I don't understand why, our rule requires that if you do not seek a TRO when you file your complaint, you must thereafter, if you seek a pendente lite or interlocutory injunction, file a notice of motion seeking that relief. Our rule now provides that you may get an order to show cause without a temporary restraining order and, in addition, the order to show cause may include the summons so that the order to show cause acts as the process for the cause, providing that you have in the order to show cause the elements of a summons. In other words, the name of the attorney, the fact that

the answer must be filed with the Clerk of the Superior Court within 20 days, etc.

4:52-1(b). This is, I think, a very convenient change in the rules for lawyers.

It will save a lot of paper work and makes an awful lot of sense. One thing

beware of if this order to show cause and indeed any order to show cause is going

to act as original process, it must be served in accordance with the service rules,

that is, by the sheriff unless the court otherwise directs. So if you want to

serve this order to show cause other than through the sheriff, you must provide

in the order to show cause and convince the judge, incidentally, that the order

should be served by someone other than the sheriff, your office or whoever.

The next rule is 4:53, receivers and liquidating trustee. 4:53-1 has followed the injunction rule with immediate and irreparable damage instead of all of the fancy language that we had before, that is, for the ex parte application of a receiver and in that way is in conformity with that rule. Other than that, there is no significant change except language change in the rule. The biggest change in this rule deals with the use of countersigners. As you know, under our receivership practice now, the rules provide for the appointment of a countersigning officer together with the receiver and the countersigning officer is required to sign checks with the receiver and in addition is charged with auditing the receiver's account when the receiver notices the account for final settlement

and the countersigning officer is given certain fees, per check, etc., as provided in the rules. Now the accounts of receivers will be audited by the clerk of the superior court in the usual course unless the court in its discretion decides in a particular case to appoint a countersigning officer. If a countersigning officer is used, generally he will act as he has in the past, except that his fees are limited by the rule, except in unusual circumstances I might add, to the fees the clerk would command had he audited the account. Of course, that makes sense. The countersigning officer is not mandatory. If there is a countersigning officer, we have provided in the rules now that he must get a duplicate copy of the bank statement of the receiver each month and this is just an added caution that has been grounded in the rules because of some unhappy experiences over past years.

Remember that if there is to be an attorney for a receiver in a cause, before he can be entitled to earn any fees in the cause, there must be an order appointing him. This is a mandatory prerequisite under the rule. I refer now to 4:53-3.

The rule dealing with receiverships has also been clarified, 4:53-5, so that a plaintiff's attorney may be entitled to a fee for allowance for his services in commencing the action and in prosecuting it up until the time of the appointment of a receiver. The language of the rule as it presently exists arguably could be

construed to preclude such an allowance. That argument has been taken out of the rule and it is clear now that an attorney in that position is entitled to apply for a fee.

Under 4:53-4, you should note that the attorney for a creditor objecting to the account of the fiduciary is entitled to the allowance of a fee be paid out of the estate where his efforts materially benefit the estate and all creditors within the same class.

With respect to vouchers on a receiver's account, if the clerk is to audit the account they will always first have to be lodged with the clerk of the superior court and he in turn will return them to the sergeant at arms in chancery chambers so that they will be available, I believe it is, the last 10 days before the account is to be heard. He will take care of that automatically. But if there is no countersigning officer, you must remember in a receivership accounting, you will have to lodge the vouchers with the clerk of the superior court just as in an estate matter, in a trust or an estate matter. Of course, if there is a countersigning officer and he is to audit then they will be filed with the sergeant at arms as in the present practice.

Rule 4:54 covers assignments for the benefit of creditors. There is a note under this rule that the procedures, provisions and restrictions of 4:53 are

applicable to proceedings taken in respect to assignments for the benefit of creditors, even though the matter is brought in the county court rather than the superior court. You should also note that failure to file timely the assignment in the surrogate's office does not constitute a jurisdictional defect in the pleadings and that is in accordance with the ruling in In re Munson-Lieb Corporation, 68 N.J. Super. 281. Also with respect to the 20% statutory limit as to fees for the assignee, it is made clear under this rule that that 20% does not include disbursements and other costs. It is not to include those items of the assignee. The 20% fee in other words is a fee, period.

Now we come to a rule that is probably, I guess, the most revolutionary of all the rules we have and that is 4:58, the offer of judgment. I might say before there is too much excitement about this rule that it will only be in effect in September in the counties of Middlesex and Essex where it will be on a trial basis. As you know, we have had an offer for judgment rule under the present rules since 1948 or thereabouts and it has really meant nothing. This time it was proposed in a tentative draft and has now brought into the rules as adopted by the court a situation that intends or hopefully intends to make the rule work. Essentially what the rule provides is that any party to an action other than a matrimonial action including both actions in which unliquidated damages and

liquidated damages are sought and including both actions in which money damages and non-monetary relief is sought may at any time not later than 20 days prior to the first scheduled trial date or the first listing on the daily or weekly call, whichever is earlier, serve upon the opposing party an offer to allow a judgment in a specific amount or of a specific nature to be taken against him if he is defending against the claim or to be entered in his favor if he is asserting a claim. The party to whom the offer is made has until the 10th day prior to the first trial date or first listing in the call to accept the offer. If it is not so accepted it is deemed withdrawn and is inadmissible for any purpose except the fixing of allowances after trial. The fact that an offer was rejected does not preclude a party from subsequently submitting the same or a different offer within the prescribed time. Now the consequences of non-acceptance are spelled out in rule 4:58-2 and 4:58-3. The first deals with the non-claimant's rejection and the other deals with the claimant's rejection. Both rules provide that if the judgment is at least as favorable to the offering party as his rejected offer, he is entitled to costs of suit. 4:58-2 further provides that if a money judgment is entered in favor of a claimant in an amount at least equal to his rejected offer, the claimant is also entitled to 6% interest on the judgment calculated from the date of the offer or the date of the completion of discovery, whichever

is later. The purpose of the stipulation of the later of these dates is obviously designed to afford the defending party a reasonable opportunity to make his own evaluation of the reasonableness of the offer in terms of the probable financial worth of the claim. Both rules further provide that in all actions to which the rule applies except negligence and unliquidated damage claims, the court shall allow a reasonable counsel fee to the party whose offer was rejected if the judgment is at least as favorable to him as his offer, provided however, that the amount of the fee which is to be fixed by the court upon consideration of the relevant circumstances not exceed, in any case, \$750. The real innovation of the rule lies in its approach to the allowance of counsel fees in negligence and non-liquidated damage cases in which the allowance of the \$750. maximum fee is subject to a 20% margin of error on the part of the rejecting party. Thus the plaintiff, that is the party asserting the claim, is only entitled to a fee allowance if his recovery is in excess of 120% of the offer. For example, if the plaintiff, pursuant to this rule, expresses his willingness to settle the claim for \$5,000. he must recover \$6,000 or more in order to qualify for a fee allowance. Where it is the defendant, that is the party against whom the claim is made, who makes the rejected offer, he is entitled to the fee allowance only if the judgment is (1) less than 80% of the offer; and (2) at least \$750. The latter proviso is

obviously intended to protect the plaintiff from the penalizing consequences of the rule where he prosecutes the action in good faith and an offer is made by the defendant in a nominal amount and a no cause verdict is returned. Of course, there have been a lot of objections to this rule and I suppose the only way to describe it is that it is one aimed at calendar control. I think, however, that before we can say that the rule is a good rule or a bad rule, we will have to look at the experience to be gleaned in the counties of Essex and Middlesex over the coming term when that rule will be effective in those jurisdictions.

I understand that Saul Tischler mentioned a couple of the changes in the foreclosure rule. I just want to point out that the provisions of 4:64-1 which permits the entry of judgment in favor of a plaintiff when there may be some dispute of the priorities of junior claimants, will have to be subject to this proviso, speaking as an equity judge. There may well be situations where the second or third mortgagee having a valid dispute between them as to priority may desire to hold up the entry of judgment to determine which of them is going to bid in at the sale to protect their interests and, of course, it would be extremely important to that junior encumbrancer to know whether he was second or third, to know how much he was going to bid. Now I warn you or suggest to you by way of warning that a routine application to hold up a judgment will probably not work.

There would have to be good reason shown in a matter in order to hold up the judgment, but this will be an application, I believe, under the rule to the discretion of the court. And I would suggest, of course, that under the rule the standing master having the authority and the jurisdiction to enter the judgment would have to be informed of any application that is to be made and adjudged in any vicinage in this regard. This is not in the rules, but I read it between the lines.

4:64-2(b) is a new provision designed to stop such results as that reached in Silver v. Williams, 72 Super. 564 (App. Div. 1962) where a defendant judgment creditor in a foreclosure action can gain priority over other such defendants by issuing an execution and levying after the action is commenced. It is essentially unfair to permit such a result when there are other defendants in the action who rely on the priorities as set forth in the complaint. Now 3 or 4 years ago I decided a case which was never appealed, <sup>Care</sup>Honer v. Gower, 89 N.J. Super. 519 (Chan. Div. 1965). That case involves two foreclosures over the same piece of property which unhappily because of administrative problems, wound up one before Judge Lora and the other before me. As you know, in the vicinage I, Bergen, Passaic and Hudson counties constitute the vicinage. The judge at Jersey City and the judge at Hackensack divide the Bergen County cases between them by docket number. The

implied result in Honer v. Gower is that priorities as set forth in the complaint are frozen at the time of the filing of the complaint until hearing by the court. So that no one can jump over someone else by instituting another action or by levying execution on the fund, for example, in the clerk's office as happened in Silver v. Williams. It is really a status quo situation until all claims can be made.

Under 4:64-5 the rule provides now that if you hold a note and mortgage, you must foreclose the mortgage first just as if there were a bond and mortgage and this, of course, makes the comments of the Supreme Court in the DeMarco case now a rule of court. As far as I am concerned as a chancery judge, it makes sense. There just didn't seem to be any reason for the artificial distinction between the note and mortgage and bond and mortgage situation. Our own experience has been that most of the major lending institutions now draw a "bond in a note form" which seems to obviate most of the problems.

Under 4:65-2 dealing with sales, public sales, the one change I would like to bring to your attention is that which requires that the owner of property should be noticed of the sale, whether or not he has appeared in the action. We have had some unhappy experiences because of the lack of this kind of a rule and the reason for it I think is obvious.

I would draw your attention but will not comment for want of time on 4:65-6 which now draws executors and trustees selling under the provisions of the rule in accordance with the statute.

Under 4:66, in dealing with the sale of infant's lands, the amount which dispenses with a second affidavit of appraisal has now been raised to \$1,200. instead of the \$300. maximum that presently exists in the rule. It will be of some help. My own belief is that it should be higher than that, but that is where it is. Rule 4:66 which deals with the sale or mortgage of infant's or incompetent's lands has not been changed, but the rule I believe has been restyled really by using the existing rule and some, I think, clearer language so that the rule now makes sense. You will note for example 4:66-1, the first sentence is from 4:84-1 and from 4:84-2 the fifth sentence are now in one rule. As the rule existed in the present practice, in our experience as chancery judges, lawyers just threw up their hands on the sale of an infant's land and either went to a title company or tried to catch the chancery judge when he was off the bench to help him draw the complaint and none of us would blame him for that. I think the rule now is clear.

4:67, which is the summary proceeding rule. The court has rejected my revolutionary proposal to convert everything but a matrimonial action into a

punitive summary proceeding rule. What they have done I believe is at least, and I understand that Mrs. Pressler has regarded it as a radical innovation, my proposal, but what they have done now is provide in effect for a broader summary proceeding rule but have suggested that where you have filed a complaint in an action which you think can be disposed of summarily, although you are not quite sure, and that is what my proposal aimed at, you can move to bring the matter on summarily, in effect a motion for summary judgment, and thus get the parties before the court so that the court can determine whether the matter can be treated summarily or perhaps treated on a short notice with a minimum amount of testimony, that is, perhaps one day. And what I have in mind, for example, is the specific performance case. A agrees to sell. B agrees to buy. A's wife changes her mind after the contract is signed. B has sold his house. He has to move into A's house and A's wife doesn't want to close. Typical specific performance case. If this case is tried on a plenary action, a complaint is filed, a summons issued. The 150 day rule applies and in the meantime, B and his wife are living in a park or trailer or a hotel or something like that. The idea is to get the action before the court as quickly as possible. Obviously in a case like that there would probably have to be some testimony, but a minimum amount of testimony. It would be the testimony of A and his wife and B and his wife. Perhaps the real

estate broker. Something that could be disposed of in a few hours or perhaps a day. Discovery requirements would be minimal. I am talking about the average case now. I am not talking about when we have complications. By using this rule, following it, and I haven't got the time to go through each of the steps, I would suggest, you can expedite cases like that and really effect substantial justice for your client. Because while you can tell your client that in nine months or when the court gets to it a year from you, you will own the house, I am sure your client is not going to be happy with his vision of justice and the expediency with which courts supposedly work. Now the rule spells out, I think, in very clear terms the steps that can be taken. The rule as proposed, with its motion to treat the matter summarily cannot, of course, interfere with the right to trial by jury. If the right to trial by jury exists in the case, and that is something the judge will have to meet in each situation. Of course, in the chancery case it is a rare bird if we have the problem of jury. The reason I understand for the rejection of the proposed radical change in the rules was that some counsel felt that applying to a judge for an order to show cause in just about any kind of case might give the lawyer an unfair advantage and that he applies and gets the judge's ear in advance. Well, our rule provided originally that the assignment judge was the only one to issue these orders to show cause and they were to be returnable

before another law division judge. And, of course, as far as chancery judges are concerned, day in and day out they are dealing with ex parte applications in all kinds of matters and I think they are fairly immune, I think, and they know pretty much all of the approaches that might be directed toward getting your ear in a given case. It doesn't take long to grow the antenna, I can assure you. I would commend this rule to you in a situation where you know you have a simple issue, where you know that time is what you need and that by the defendant just delaying a case through discovery, etc., he will in effect win the case because he will defeat your client's rights, but you go to this rule, take a good look at it and see if you can't use the procedures which are set forth here. Of course, with respect to the old summary actions as are contained in the rule, they are still incorporated in the rule and the summary proceedings will proceed as of old. My colleagues are telling me that it is not allowed in unliquidated money damage cases, whatever that means. I am a chancery judge. I don't know about money.

Take a look at 4:69, the prerogative writ rule. There are no changes except it has been completely emasculated if not obliterated. Actually, the rule has taken away all of the gingerbread and the fringes that have existed over the years like prerogative writs are abolished and in lieu thereof, hearing as of right.

That is all gone. The rules that are contained there now are the rules that apply to law division or to trial division prerogative writs on the law side. All of the rules relating to appellate prerogative writs are contained, of course, in the appellate sections. There is one nice little feature in the rule that permits interlocutory appeals on the law side, the lower court prerogative writs, for example an interlocutory appeal with respect to a hearing before a board of adjustment, where the proceedings have taken a turn and you believe that the turn that they have taken are going to deprive your client of a just result before the board, for example, you may petition for leave to appeal to the law division on that issue and it is, of course, roughly analogous to the interlocutory appellate practice before the appellate division. It is something again to bear in mind because it can be a very effective tool in practice in the prerogative writ area.

I have gone to Rule 4:70 and I am told it is time to finish up. So I am going to do so. Actually there weren't too many other changes of any great consequence.

I understand Mr. Wildstein has mentioned the right to interrogatories in a matrimonial action which is I think the most significant change under the matrimonial rule, except the provision of 4:42-8. Under paragraph A of that rule, there is the elimination of the provision in the present rule allowing costs as of course

to a wife who does not prevail in a matrimonial action. I understand Sylvia Pressler is the only dissenter on the rules committee.

I think that under the provisional final remedies these are the most significant changes found in these chapters of the Rules. The matrimonial provisions, as I said, and the probate provisions have minor practice changes and minor language changes which are of no great significance except those which have been mentioned by other speakers under the general rules. I think the rules that I have mentioned to you are the ones that do change our comfortable way of life in practice, but I think that you will find that in each instance, they have been designed to make it easier in the practice and to avoid much of the paper work and much of the procedural folderol that we have met in what should be very reasonable proceedings and which have been very lugubrious in some circumstances.

Thank you.

JUDGE TISCHLER:

Thank you. Tonight, we are indeed very fortunate to have as our last panelist a man of great distinction. A man of many accomplishments. A former state senator, a former dean of a great law school, Rutgers, of which many of us are alumni, a former presiding judge of the Appellate Division and now one of the most active practitioners at the bar. Judge Matthews tells me that he is formerly

his praeceptor. Now the man really the prime mover of the adoption of these rules is Judge Clapp. He was chairman of at least two or three committees. He was chairman of the coordinating committee. A number of years ago, although he is a graduate of Harvard Law School, the Yale Law School Alumni Association deemed it advisable to give him their first award for that person in the State of New Jersey who has helped the administration of justice the most. He is a friend of mine of long standing. For at least 39 years, I have been working with Judge Clapp in various capacities. We were both editors of the current New Jersey Law Journal many years ago and I consider it a great privilege to introduce to you Judge Clapp who has devoted his entire legal life to the administration of justice and its improvement. Judge Clapp who will speak on appellate practice.

JUDGE CLAPP:

Thank you very much, Saul. That introduction makes this look more like a political rally than it does like a rules session. I am going to try to pop in to you, because I should save some time for questions, the significant changes in Part II of the Rules.

You will see from the rule 2:1 that we have merged the appellate rules that formerly dealt with the supreme court in Part I with the Part II rules which dealt just with the appellate division. This corresponds to the merger of the county

court into the superior court rules merging Part 5 into Part 4. Moreover, the rules are organized in their content. There are only thirteen rules and the title to a rule tells you pretty quickly what the rule is about. Hence the lawyer trying to put his hand upon a point might find it much easier to use the table of contents than he would by going to the index. Let me illustrate what I mean by just reading the title to these thirteen rules.

2:2, What judgments and determinations are appealable. 2:3, Who may appeal. 2:4, Time for appeal. 2:5, How to appeal and 2:6 really a subhead of 2:5, Appendices, briefs and transcript. 2:7, Appeal by indigent persons. 2:8, Motions. 2:9, Miscellaneous proceedings pending appeal. 2:10, Scope of review. 2:11, Argument, determination, etc. 2:12, Certifications. And, 2:13, Administration. You see, you will find that the subject matter boils itself down very nicely into these heads and makes the subject matter very easily brought to your hand.

Now, I start with 2:2-1. This, and I am only going to take the significant changes. This limits appeals of right directly from trial courts in murder cases only where the death penalty has been imposed. You will remember that the present practice takes to the Supreme Court directly as a right those cases where there is an indictment of murder. That is, where there is a possibility of a death penalty. Likewise all post conviction proceedings where there has been an

indictment for murder will now go to the Appellate Division instead of to the Supreme Court.

One of the emasculations we did, I am turning now to 2:2-3 in the prerogative writ rules, is to lift out of the old rule 4:88, the rules dealing with appeals from state administrative agencies and review of the validity of an administrative rule promulgated by a state administrative agency. Lifting those out of that rule and putting them where we think logically they more properly belong, namely, in appeals to the appellate division. Justice Jacobs drew that rule 4:88 in the first place and we were thinking then in terms of prerogative writ procedure. And all prerogative writ procedure was amalgamated under that rule, but now these days when we think of the appeals from the state administrative agencies as being in the nature of an ordinary appeal, it pulled that out and you find that in the appellate rules.

In 2:2-5, at present the appellate division judgment on interlocutory appeal is treated as a final judgment for purposes of appeal to the Supreme Court. This clearly makes no sense and now the rule is once an interlocutory appeal it always is an interlocutory appeal.

2:3 brings us to who may appeal. And there is nothing of significance here except that you will find that in 2:3-1 a catalog of cases where the state may

appeal in a criminal case. Under the present rules, you will find this catalog disbursed throughout Part III of the rules mostly. This brings them all together.

2:4-1 has to do, of course, with the time for appeals. The rule shortens the time for appeals in criminal cases. There are very few changes that we have in this Part II which might be controversial such as the offer of judgment rule and the summary action rule. This is one of considerable interest, however. We reduce the time for appeal in criminal cases from three months to forty-five days. You must remember that the federal rule time for appeal in the criminal case is thirty days. Moreover, the rule enlarges the time for appeal from final judgments of contempt from ten days to forty-five days. The ten day practice is a rather crazy practice that grew up in our pre-1947 practice.

2:4-4 deals with the power in the appellate court to extend the time for appeal from state administrative agencies. It is limited to not exceeding thirty days. You will remember under the prerogative writ rule, 4:88, there is a discretionary power in the court to extend the time for appeals so long as interest of justice requires. When we pulled that part of the

perogative writ rule into Part II, we were brought up to the problem as to whether or not this right to extend the time for appeal should be so broadly limited or whether those appeals should be analogized to other appeals where the time is limited to thirty days beyond the forty-five day period. So we have, and I think with practical justification, conformed the time for extension of appeals to thirty days in connection with state administrative proceedings. And the reason I suppose back of it is, in a state administrative case you have a better prepared record. You have better parties than might be in some municipal office.

2:5-1 has to do with how to appeal. Hitherto the jurisdictional requisite for appeal was to file the notice of appeal with the clerk of the court from which the appeal was taken. Now you have another step. You must file it not only with him but also with the clerk of the appellate court. In the old days, the clerk of the trial court or the court from which the appeal was taken had to file it in the appellate court himself. Now you must do it and that is jurisdictional. Moreover, the rule now explicitly requires service of a copy of the notice of appeal on all other parties who have appeared in the action, not merely the attorney for

the respondent which was a rather ambiguous injunction.

2:5-1(b), notice of appeal must also be mailed to the trial judge but only where the judge sits without a jury, or where there is a challenge to orders respecting new trials and judgments n.o.v. If the trial judge has written an opinion or made a prior statement orally which has been reported, he may then file his reasons. Although if he hasn't made any such opinion, he must now file a written opinion. It is not a jurisdictional requirement that notice must be served on the judge. There was a little controversy in the rules committee as to whether a judge sitting today without a jury in a criminal case should be required to file an opinion and the Supreme Court agreed with the majority of the committee that he should be so required. The elements of that argument, I think, are pretty plain.

2:5-1(g) this rule renders unnecessary the filing of the notice of appeal where a court grants an interlocutory appeal. The order itself serves the purpose of a notice of appeal.

2:5-2. This rule changes the practice by requiring a party making a deposit for costs to give notice thereof to the other party, rather than

as under the present practice the other parties must write to the clerk and see whether the appellant is living up to his requirements. The rule also increases the deposit from \$100. to \$200. Inflation. Under the present practice a party making a motion for leave to appeal is required to deposit \$50. at the time of the motion and then make a deposit \$100. if the motion is granted. The present rule requires only one deposit, namely \$200., which covers both the cost of the application and the cost of the appeal if leave is granted.

2:5-3(a). After some indecision on the matter, the rules committee proposed the rule now adopted requiring the transcript to be ordered no later than the time of the filing of the service of the notice of appeal as is the practice presently.

2:5-3(c) the transcript may be abbreviated either by written agreement of the parties or by order of the trial judge made on motion. You recall that under the old days occasionally a court reporter had to write up 2,000 pages of testimony, even if the appeal had to do only with an objection to a charge. Incidentally, the new rule eliminates entirely the present practice of an agreed statement in lieu of record, which proved to be a

rather futile exercise. Nobody ever did it.

2:5-3(d). The appellant must make a deposit with the reporter of either the estimated cost of the transcript or the sum of \$150. per day or for any part of a day. And the original and a copy of the transcript are prepared, the copy being delivered to the appellant and the original being filed with the clerk of the court. Let me continue dealing with this practice as to the transcript, although I think we are going to get into other rules. The clerk of the court below, 2:5-4(c), or the agency from which the appeal is taken must on request deliver the original transcript to the appellant in exchange for a copy and furthermore must, on request of a party or judge of the appellate court, deliver to the clerk of the appellate court portions of the record as may be designated.

Let me skip to 2:6-1. The significant change here is that the transcript is not to be reproduced as part of the appendix on appeal to either the Appellate Division or the Supreme Court. You don't print the whole transcript in your appendix. No more than three copies of the transcript in addition to the original filed by the reporter are needed. Getting to the brief, the statement of questions involved is also out.

Nobody ever read them anyway. The lawyers spent a lot of time writing them but nobody in the appellate court ever read them anyway. Instead we've got a concise procedural history showing the nature of the proceeding and referring to the judgment appealed from where there are public respondents, that is, respondents representing the state or political subdivision or political agency, the respondent must either file a brief or a statement as to why a brief is not filed. He just can't let the thing go by the board without appearing and without paying any attention to it. Printed briefs cannot exceed 50 pages as heretofore; 65 pages if typed or otherwise reproduced. Reply briefs have been reduced from 20 to 15 pages if printed or 20 pages if typed. We still have india egg shell paper if the method of reproduction permits. If you have typed briefs they may be 8-1/2 x 11 in size.

2:6-11(a). The major change here is that the time for filing appellant's brief is increased from 30 to 45 days. The respondent must still file and serve his brief and appendix, if any, within 30 days.

2:6-11(b). If a cross appeal has been taken, the party first appealing must serve and file the first brief and appendix within 30 days after the service of the notice of cross appeal. This does away with a very

complicated rule we have presently.

2:6-12. This rule is of significance primarily by decreasing the number of briefs, appendices and transcripts to be served and filed all in the interest of reducing the cost of appeals. In both the Supreme Court and Appellate Division one party need serve his adversary with only two copies of the briefs and one copy of the transcript. It used to be three, you remember, three copies of your brief. On appeal to the Appellate Division, five, formerly six, copies are required of the brief and appendix. On appeal to the Supreme Court, nine, formerly twelve, must be filed with the clerk. This means that there will not be available for the uses in the State Library in the county law libraries and in the law school libraries extra copies of appendixes and briefs. But many of the Appellate Division judges allow their copies to be used and filed in the various law libraries.

Assignment of counsel. We are getting down to 2:7, appeals by indigent persons. The assignment of counsel to an indigent is made mandatory on all appeals from convictions and is discretionary with respect to post conviction relief, office of Public Defender represents in connection

with every indictable offense. If the offense is not indictable, assignment is made in rotation as most of you know from a list prepared in the trial courts.

2:8-1, motions. As heretofore, all motions must be accompanied by a brief. There are a variety of motions which perhaps don't require a brief and perhaps we should change that so as to eliminate the necessity where there isn't any need for a brief.

2:9-2. We are dealing now with adjournments, extensions and accelerations in time. They may be granted by the Chief Justice in the Supreme Court or by a presiding judge in the Appellate Division. In other words, the whole court doesn't have to pass on it.

2:9-5, judgments of contempt are now <sup>I</sup> automatically stayed if a bond is filed and approved. In other words, you need a stay. In the old practice an appeal from contempt was somehow an automatic stay. And that has been wiped out. The initial stay must be made to the trial court unless and until the case has been set down for oral ~~arg~~ argument in the appellate court. At that point the appellate court is familiar with the matter and an application will have to be made to it.

2:9-8 again you can get temporary relief from a single justice or a single judge in the Appellate Division to remain in effect until the court acts.

2:10 gets to the scope of review. We have eliminated the old formula that it must clearly and convincingly appear that the verdict was the result of a mistake, partiality, prejudice, of passion. I remember hearing Justice Proctor saying one time in an argument in the Supreme Court, "mistake, partiality what are those words." They are just a mumble of words that are pretty threadworn. We also have eliminated after much consideration, any rule codifying when the appellate court will interfere with findings of fact in non-jury cases. This is sufficiently a complex matter. We felt it better to go back to the cases rather than to try to lay it down in the rule of thumb which wouldn't be too satisfactory.

2:10-2 gets rid of immaterial errors. The way it is phrased is to disregard error unless it is of such a nature as to have been clearly capable of producing an unjust result. In other words, there is quite a burden there if you are going to try to come up on a technical error.

2:11-1. Preferences. You really are referred back to Rule 1:2-5 here. Preferences are (a) criminal, election cases, other actions to which the

state is a party, the state or a public agency is a party (b) appeals on leave granted. They have a priority because they are holding up things down below and (c) workmens compensation cases. Parties entitled to 30 minutes in the appellate division. Now it is presently 45 and has been reduced to 30. 45 minutes in the Supreme Court.

I might mention 2:11-2. Where a motion is made for leave to appeal, the court may elect to consider the merits of the appeal and decide it simultaneously with the motion for leave to appeal. Often the court really has all the papers it needs before it at that point, though are the parties then entitled to a further oral argument because they have not addressed themselves to the ultimate meritorous question.

2:11-3. Let me emphasize this because this has been quite a confusing aspect of appellate practice. The mandate is eliminated. The opinion itself can include the judgment and no other form of judgment is required. The date of the filing of the opinion is the date of the judgment.

2:11-4, an application for an attorneys fee may now be made in the brief supported by affidavits as well as by motion, but the motion must be filed within 10 days after the decision of the appeal. Let me show

the extension of the practice for the allowance of fees in the appellate court. These are now allowed in all matrimonial actions. Remember that the present rule just allows them in the case where a wife prevails in a divorce, annulment or maintenance action and in other narrow situations;

All matrimonial actions as defined in the Superior Court rules. This

analogizes the appellate practice much more to the Superior Court practice.

In the case of a will contest, under the present practice a fee is allowed

only if the will is sustained. But under the new rule, the trial court

practice is adopted, namely, an allowance is payable by the estate or if it

appears that the appellant did not have a reasonable cause for taking the

appeal, to be paid by the opponent. In workmens compensation cases, there

is also a substantial change. The present rule, you know, gives the county

court the authority to award counsel fees for services in the Appellate Division

and in the Supreme Court. But the appellate courts are usually in a better

position to judge the value of the services and the new rule changes the

practice.

Certification, 2:12-3. There is a significant change here. The old practice of applying for certification to the trial courts is eliminated.

In the practice now provided by the new rules, the procedure is to perfect

the appeal from the trial court to the Appellate Division and then when the briefs are filed there and the matter is pending unheard in the Appellate Division, an application can be made to the Supreme Court for certification.

The deposit for costs in 2:12-5 has been increased from \$100. to \$250. The length of the petition for certification has been shortened from 20 pages to 15 if printed. 20 pages if typed. The time for serving the answering brief 2:12-8 is increased from 10 to 15 days.

One other point, 2:12-11. Once certification is granted, the petitioner's entire case and all the issues therein are before the Supreme Court. Everything goes up once certification is granted unless the court otherwise orders. I think that gives you a summary of the significant changes.

JUDGE TISCHLER SPEAKS:

Thank you Judge Clapp. Instead of taking a break, I think we better get to the questions so that we can finish up within a reasonable time. Any of you not interested in the questions can leave. We have received a number of questions. They have already been assigned and anybody else who has any questions, you can bring them up. Do you want me to read the

questions? I am assigning the questions to the one of the panel I think is most appropriate to answer it. Judge Matthews will take the first group of questions. Those of you who are leaving, will you please leave. Those of you who stay will please be quiet.

JUDGE MATTHEWS SPEAKS:

All of the questions addressed to me seem to go to this note and mortgage situation. The first one: Is the effect of the rules retroactive, that is, if a suit was filed on a promissory note before September 8, would it have to be dismissed in favor of foreclosure of mortgage after September 8? I believe that the rules being procedural, of course, affect any action which is pending before the court. I think that to answer this question directly is impossible because it would depend upon the circumstances of any given case. Judge Tischler says, you have sufficient notice now.

There may be cases where we would not apply the rule, but I think the hard and fast rule would be yes. The answer would be yes, you would have to start a foreclosure, if your case had not been reached before September 8.

Someone asked me if prior to suit on a note the mortgagee cancels or discharges the mortgage, may the suit then be brought on the note? As

far as I am concerned, the answer is yes, but I would probably issue terms that you could not execute against the real property.

4:64-5 - again is it retroactive and I think I have answered that.

Question is does it apply to second and later mortgages, particularly in cases where such encumbrances are created as additional collateral.

Again the answer to that would have to depend on the particular facts of the case. I refer you to the DeMarco case and the rule as it is presently and now drawn to be effective. It would again depend. I had a situation before me where a stay was asked of a motion for summary judgment in another vicinage on a note in which there was no defense where the first lienor was a mortgagee and who it foreclosed. The matter had just proceeded to judgment before the standing master and a sale was about to be noticed. I denied the injunction to stop the action for summary judgment in the other vicinage, but I suggested that an application be made to the judge in the other vicinage staying execution on the judgment until the property had been sold because we could not determine the fair market value situation or whether the property itself would bring sufficient to realize the first, second and perhaps third encumbrances on the property.

The last question is, does this rule, the proposed or the new rule, unconstitutionally impair the obligation of contract. I don't think it does. I don't know what constitutional right there would be to get your money one way or the other. It just doesn't seem to me to be a substantive question. It seems to be a question of procedure rather than depriving you of any particular right. I suppose the only way you can look at it is that one is more expeditious than the other. But I don't think there is any constitutional question involved at all. And I think if you take it up, the court adopted the rules, I would suggest the result would be obvious. There is no federal question involved.

JUDGE TISCHLER:

Someone has asked me my view. I think if the court in the DeMarco case could have construed the note to be included within the terms "bond", you would have no objection to that. It was a very close argument. They could very well have construed the DeMarco case that the statute would apply to notes and certainly they can now undo their decision in the DeMarco case, which held that the statute was inapplicable to notes. Mrs. Pressler will take the next group of questions.

MRS. PRESSLER:

There are a couple of questions on 1:4-4(b) which is the certification in lieu of affidavit. The question is asked, does it apply to affidavits of proof in defaults and friendly settlements including proofs by experts? The answer is yes. Affidavit of proof can be by certification instead of affidavit. The answer is yes. The answer is always yes. Any affidavit provided for by the rules can be substituted for by certification, provided it conforms with the language of the rule that you know that you are subject to punishment for contempt.

Rule 1:5-7, must affidavits be filed when defendant is a corporation?

1:5-7, is non military service. I never knew of a defendant corporation in the military service. I may be missing the intent of the question or may be the wrong rule was cited.

1:21-3(c), appearance by law students. This is one I didn't mention but it is worthy of note that the rule with respect to practice by law students has been substantially expanded to provide that any law school or legal services project may propose a program for practice by law students in the Juvenile and Domestic Relations Court, the County District Court or the Municipal Court and if the program is approved by the Chief Justice

then the law students simply appear as lawyers in those actions in accordance with the program. The more interesting question is whether or not where there is a constitutional right to counsel, to wit, in the Juvenile and Domestic Relations Court, that right will be satisfied by having a law student appearing under one of these programs rather than an admitted lawyer. I must confess that I hadn't given consideration to the question. My instinct would be that if there is a constitutional right to counsel, it should be a fully admitted member of the bar.

Why has R.R. 4:98-2(c) prohibiting publication fees been waived? This has to do with proceeding in forma pauperis in matrimonial actions. I refer you to 1:13-2 rule of general application covering in forma pauperis proceeding in all courts.

This question reads as follows: The rules seem to have been changed to favor the defense. What has been done to protect and/or militate in favor of the plaintiff's case? Well, I don't accept the assumption of this question. The two rules that everyone gets agitated about are the offer of judgment rule and the expert deposition rule. The offer of judgment rule I think is going to wind up aiding plaintiffs, and I am one of those who fought against

the rule as a plaintiff's attorney. Aside from this 20% business, if your offer is rejected you are going to get interest on the judgment which is something that the plaintiff's bar has been fighting for a long time, even if you miss out on the counsel fees because your offer was not 20% greater than the amount recovered. I don't think the offer of judgment rule favors the defense. That is my view anyway. The expert deposition rule, that very well may, except I recall with the DiDonna v. Zigarelli case came down which said that you could have depositions of treating physicians, the plaintiff's bar got quite agitated about that but as a practical matter, treating physicians are not customarily, in the garden variety of negligence cases, deposed so the question really seems to be is that because the treating physician's heretofore have been immunized from giving their opinions or are carriers also selective with respect to the cases in which they start harrassing. That remains to be seen, but I don't think it is a foregone conclusion that the carriers are going to simply start dragging all of the treating physicians in for depositions. They haven't done it yet and if that was the motive, I think they already could have.

Voir dire. I fought against that rule. How do we safeguard ourselves against a judge with idiosyncrasies or one who fails to ask proper questions or sufficient questions on voir dire to permit a meaningful evaluation of each potential juror and then refuse further questions by counsel? What do you do about a judge, three-quarters of the time. You tend to get cynical around 9 o'clock at night. This is, of course, within the area of judicial discretion, as is practically every other application you make to the court. You argue. Presumably, judges will be somewhat instructed since they are really going to be taking the voir dire responsibility and presumably there will be guidelines set as to what is appropriate and what is not appropriate. It might be a good opportunity or good reason to use the availability of the general panel.

Someone wants to know, may a judgment be entered against a defendant where he is sued by initials or must the name be supplied before judgment? Judgment may be entered with initials. This is to be contrasted with a fictitious name defendant in which the judgment cannot be entered until the name is supplied. This rule used to apply only to the district court and probably the reason it never applied to the upper court was because of the terrific problem with liens when you get your judgment searches and God

knows what those judgment searches are going to look like except and this may be helpful, the abstract rule does require for the first time that the address of the defendant as well as his name be docketed and if an answer has been filed there should be some help in being able to distinguish between persons of the same name.

One last question. In the district court, if an individual conforms to a pro se answer by notifying the clerk of his appearance, can an attorney later appear in the proceedings? Certainly. The question then is, does he have to file a formal answer. If he doesn't do it on request, he would probably have to do it on order. By that time if he appears at trial which is what the question suggests, you have already had discovery and know what the issues are and the answer has become probably irrelevant.

JUDGE TISCHLER:

I am going to take just one question. Someone asked in the motor vehicle property damage case where defendant is in default, why can't proof be entered by affidavit? Rule 6:6-3(c) says it may be in the district court. They haven't adopted it in the upper court.

MR. SCHNITZER:

The first question I have is whether a class action may be initiated by

a single plaintiff, and the answer is yes. The rule is quite explicit in saying that one or more members of a class may sue or be sued but I don't think that is the full answer. The conception of class actions now is that they are going to be managed and monitored by a judge to a greater degree than happens ordinarily in our adversary system. Thus, Rule 4:32-3 provides (a) that the judge at the very start determine the course of proceedings in the action and (b) requiring for the protection of the members of the class or otherwise for the fair conduct of the action that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims. Now at this stage of the case, and it is expected that this will be an early stage, judge initiated, that somebody or another in a class will come in and say, one representative for a group as numerous as we are just is not adequate, and considering the rewards which class actions when successful generate, that is, counsel fee allowances, for here typically and uniquely you have the fund in court which justifies the allowance of counsel fees, it would be a very rare important class action in which one plaintiff, the one who started the ball rolling,

would up by being the sole plaintiff's representative.

The next question I have reads as follows: Assume you represent a tort victim. You believe that A, B and C are tort feasons, but you believe that many other tort feasons exist. However, you don't know who they are. In seven days, the statute of limitations will run. Is it effective to name John Doe as a defendant and move to amend and serve the tort feasons after you learn his name, although after the statute of limitations has run? Frankly, I don't know. It is true that 4:26-4 quite specifically authorizes the use of John Doe designations in actions in personam and it goes on, however, to say that that procedure may be used if the defendant's true name is known. It suggests that you know the defendant, and merely that you don't know his name. The question that I have been given is rather different. It assumes that you suppose that there is such persons but you could not know them in the sense of being able to describe them in any way, name apart. I don't know. On the other hand, and it is equally true too that the relation back rule would not be satisfied in its new version and the reason would be by hypothesis, there would not have been notice to the later substituted defendant within the time of the statute of limitations so to that question, I simply have to say 4:26-4 is what I would rely on.

But whether it would suffice, query.

The last question I have relates to 4:5-4 and I am asked this. Now that it is necessary in pleading affirmative defenses to plead facts rather than conclusions, just how do you assert contributory negligence in the brief period that you have for your answer when you may not have been able through discovery to confirm the facts of contributory negligence. Well, there are two possibilities. First, the reason for the recital of fact, the requirement of fact pleading as to defenses is two fold. To begin with, when the 1948 rules were adopted, we made a very specific election to forego the federal system which is issue pleading, predicated upon the assumption that pleading which does hardly more than notify the adversary of the general character of the claim is quite adequate to kick off discovery, and a pretrial conference will add concrete content. The state system at the very start in defining the requirements for a complaint took precisely the opposite direction. Our own prior experience had been with fact pleading and we said there that it was necessary to state the facts showing that the plaintiff has a claim. The federal rule reads to state a claim demanding judgment. Now, all that has happened is that 4:6-5 dealing with affirmative defenses has borrowed the fact pleading conception which is a part of our practice as to the complaint

from the start. However, it is coupled with another objective. 4:11, in its present form, now I don't know what the rule is, was a rule that required candor in pleading and made lawyers responsible under some kind of penalty.

By and large, that rule is observed. On the other hand, it was a dead letter in the case of any lawyer who didn't observe it. I know of no disciplinary proceedings of which the rule plainly warned which was actually pursued against a lawyer who was not candid in his pleadings and not responsible as to what he signed. You have heard of the grievance about the indiscriminate use of general denials. This is part and parcel of the same philosophy.

The idea is candor in pleading is your obligation and if you respect it, then you won't allege contributory negligence before you are in a position to affirm it with concrete fact content. What then may you do? Because, if by the time you file your answer you can't candidly and straight-forwardly allege contributory negligence, what do you do when the facts emerge? What you may do quite obviously is ask to amend. I would suppose that if you exhibit your predictment, that is that you respected your obligation to plead only what you know, a judge will allow it. I too can sense what may be in the minds of some of you, and that is, it is so easy to sketch out in most ordinary situations that the plaintiff was contributorily negligent,

hypothetically, in failing to make the appropriate observations and so on and simply saying that. It is factual enough but doesn't rest on a fact content and thereby avoid the obligation to seek an amendment. But if you ask it what does the rule expect of you, my guess is that if you can't, for want of knowledge, plead contributory negligence, then you must wait and do so by leave to amend.

JUDGE TISCHLER:

Mr. Wildstein will conclude with the answer to this question.

MR. WILDSTEIN:

Picking up by way of aside, Mrs. Pressler's remarks about expert testimony and who it favors, while at first blush it may favor the party who has the money, the defense, on second observation remember that the plaintiff can ask the defendant for copies of the experts reports and the treating physicians reports. This by way of interrogatories. If those reports indicate sufficient need to go to a deposition, discovery oral depositions of the report, then expense would have to be incurred. But at least at first blush he has a report available in writing.

Coming back to the questions that were asked. How is the cost of expert reports determined? Under 4:17-1 I would say, it is the cost of reproduction

which normally, I would say is 25¢ per page or invite the propounder to inspect the report at a designated time and place if you don't want to go through the trouble of reproducing it. This is set forth in 4:17-1, on the one hand, and 4:17-5.

What happened to the request for admission rule? It is still in effect, is my answer, under 4:22. It has not been changed one bit. It still exists. It was not mentioned in our discussion this morning but there has been no change to it and it is still in the rule book.

Will the new rules of discovery apply to pending actions where time has expired? I would say yes, if the time for discovery has expired. On the other hand, I would urge anyone who wants to get the expert reports or possibly the oral depositions of a treating physician or other expert to make a motion for leave to do these things. Relax the rule. And this is not in the rule itself, but is under the relaxation provision of the Rules. And the court may well do it in the sense of fairness to the new plaintiff.

The next question is: Are guidelines going to be established for the trial court in allowance of fees to doctors and other experts whose depositing are to be taken. It is a good question. I take it that where the party and the expert cannot agree on the fee the court probably, and this is only

a guess on my part, but it makes sense, will set up some kind of guidelines as to what are considered reasonable fees because the rule says reasonable, so that in the absence of being able to agree with the doctor or the expert as to what his fee will be, then I think ultimately, as experience becomes involved in this thing, the court will probably set down some guidelines for the judges.

Will failure to serve answers to interrogatories in a divorce or nullity action subject the party who refuses to give the answer to the sanctions mentioned in 4:23-2. Those sanctions are dismissal or suppression. This is a very good question. I must say that something will ultimately be done about it. I can very well say how you can get together on the divorce and say, I am going to ask you some questions, don't answer them, and you will get divorced. I mean, that is all right. I don't think that rule will be used. However, I suggest this. 4:23-2 says that if a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so, the refusal may be deemed a contempt or other consequences which the court has the power to do. Now that rule originally was aimed at oral depositions where you refuse to answer the question, but it is so broad that it would include, I think, an order to answer the question with regard to the

matrimonial matter. However, I think the rule will be clarified.

JUDGE TISCHLER:

Judge Clapp wants to answer one or two questions that were raised.

JUDGE CLAPP:

First question. How do I get my \$100. back from the clerk of the Supreme Court? He probably didn't get his moneys worth. There is no way of getting your money back.

The second question. Why still no verbatim recording of appellate arguments? You do have it in the Supreme Court you know. Not in the Appellate Division. I had occasion to read one back from the Supreme Court that had been transcribed. It just turned out to be a perfect jumble.

What is the accepted practice for getting trial exhibits before the Appellate Division of the Supreme Court? You, of course, include them in your appendix and, under the new practice, will do so, but beyond that, you can, you are quite at liberty and many a time when I was in the Appellate Division, we accepted the original exhibits. All the members of the court looked at them, and then the opinion writer had the occasion to study them. That last question, does the court look at the exhibits?